Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

JOHN A. BARRETT, JR. and
SHERYL S. BARRETT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an Indian tribe can use Indians Claims Commission Act funds, appropriated by Congress and distributed to the tribe with a specific exemption from federal income tax, to pay federal income tax exempted salaries to elected officials the tribe is required to have under its tribal constitution.

2. Whether the imposition of a penalty by the Internal Revenue Service against the tribal chairman for sovereign legislative actions of the tribe improperly infringes on the tribe's sovereign powers.

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PETITION FOR WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

Petitioners, John A. Barrett, Jr., and Sheryl S. Barrett, respectfully pray that a writ of certiorari be issued to reverse the judgment of the Tenth Circuit Court of Appeals in this case.

OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals is reported at 561 F.3d 1140 (10th Cir. 2009) and is reproduced in the Appendix at p. 1-21. The District Court did not publish its opinion. The memorandum opinion of the District Court is reprinted in the Appendix at p. 22-38, and can be found at 2007 WL 4303050 (W.D. Okla. 2007).

JURISDICTION

On April 6, 2009, the Tenth Circuit Court of Appeals filed its decision. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Tenth Circuit Court of Appeals' decision on a writ of certiorari.

STATUTORY AND TRIBAL CONSTITUTIONAL PROVISIONS AND AGREEMENT BETWEEN CONGRESS AND CITIZEN POTAWATOMI NATION INVOLVED

Relevant portions of the Indian Tribal Judgment Funds Use or Distribution Act, 87 Stat. 466, 25 U.S.C. §§ 1401, et seq., the Constitution of the Citizen Potawatomi Nation and the agreement between the Citizen Potawatomi Nation and Congress, 48 FR 40567-01, are set forth in an appendix to this petition. Appendix, p. 39-47.

STATEMENT OF THE CASE

Introductory Statement

The decision of the United States Court of Appeals for the Tenth Circuit upholds a breach of an agreement by Congress with the Citizen Potawatomi Nation which exempts tribal judgment funds appropriated by Congress from federal income tax, and usurps the legislative and electoral processes of the Citizen Potawatomi Nation in the budgeting and implementation of the agreement as mandated by Congress.

The agreement by Congress with the Citizen Potawatomi Nation, and the appropriation of funds by Congress, were pursuant to remedial legislation, *i.e.* the Indians Claims Commission Act and the Indian Tribal Judgment Funds Use or Distribution Act. The agreement mandates that the Citizen Potawatomi Nation legislatively determine, and

have approved by the general electorate, the specific expenditures to be made, and expressly provides that "none of the funds . . . made available under this plan for programing [sic] shall be subject to Federal or State income taxes."

In the exercise of its sovereign power, the Citizen Potawatomi Nation appropriated and paid a portion of the judgment funds for the salary of the Chairman, a constitutionally required tribal office. These governmental actions were made in accordance with the agreement, taking into account the broad categories of uses allowed by the agreement. The lower court decisions erroneously subject these payments to federal income tax and penalties.

The District Court failed to recognize that Indian tribes have always been exempt from federal income tax, and erroneously determined that this express exemption from Federal income tax was for the benefit of the Citizen Potawatomi Nation.

The Tenth Circuit usurps the exercise of tribal governmental power as mandated by Congress and impermissibly substitutes its judgment for the legislative branch of the Citizen Potawatomi Nation, in holding that the payments were not within the broad categories of uses authorized by Congress, and legislatively appropriated and budgeted by the Citizen Potawatomi Nation in accordance with the agreement. The Tenth Circuit also erroneously held that, assuming the payments were within the categories of uses under the agreement, absent a specification of the recipient of the funds from the Citizen Potawatomi Nation in the express language

of the exemption from Federal income taxation, though the exemption specifies no recipients at all, such payments were taxable.

STATEMENT OF FACTS

The Citizen Potawatomi Nation is the ninth largest federally recognized Indian tribe with approximately 27,000 members (73 FR 18553).

In the 1970s and 1980s, the Citizen Potawatomi Nation was awarded judgments by the Indian Claims Commission[1] with respect to lands taken from the Citizen Potawatomi Nation.

The Indian Tribal Judgment Funds Use or Distribution Act, 87 Stat. 466, 25 U.S.C. §§ 1401, et seq., prohibited the Citizen Potawatomi Nation or its citizens from directly receiving the funds for these judgments. Instead, Congress delegated to the Secretary of the Interior, after consultation with the Citizen Potawatomi Nation, the preparation of programming plans for the use and distribution of the funds appropriated by Congress. At least twenty percent (20%) of the funds were required to be set

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[1] In 1946, the Indian Claims Commission was established via the Indian Claims Commission Act, 60 Stat. 1069, 25 U.S.C. §§ 70-70v-3. A primary purpose of the Indian Claims Commission was to settle "claims arising from the taking by the United States, whether as a result of treaty or cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands or compensation agreed to by the claimant." *Id.* § 70a.

aside and programmed for economic development, common tribal needs, educational requests, and such other purposes as the affected tribe may justify. 25 U.S.C. § 1403(b)(5).

On September 8, 1983, Congress approved a plan with the Citizen Potawatomi Nation (the "1983 Agreement"). 48 FR 40567-01. Appendix, p. 39-42. The 1983 Agreement set aside for programming thirty percent (30%) of the funds, to be held in perpetual trust by the Secretary of the Interior. The remaining funds were distributed *pro rata* to the citizens of the Citizen Potawatomi Nation.

The 1983 Agreement provides that the programming funds are to be used pursuant to a Ten-Year Tribal Acquisition, Development, and Maintenance Plan (the "Ten-Year Plan"), to include "those activities and/or actions undertaken by the [Citizen Potawatomi Nation] to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the progress of the [Citizen Potawatomi Nation] economically and/or socially and/or governmentally." Appendix, p. 43.

Section 6(b) of the 1983 Agreement expressly provides: "None of the funds distributed per capita or made available under this plan for programing [sic] shall be subject to Federal or State income taxes..." Appendix, p. 41.

The 1983 Agreement tasks the development of annual budgets for the expenditure of the judgment funds to the Citizen Potawatomi Nation Business

Committee, a constitutionally created tribal body serving as the legislative branch of the Citizen Potawatomi Nation. Appendix, p. 45. Each year, as required under the 1983 Agreement, the citizens of the Citizen Potawatomi Nation vote on approval of the budget. Appendix, p. 40.

In 1996, pursuant to the American Indian Trust Fund Reform Act of 1994, 87 Stat. 466, 25 USC §§ 4001 *et seq.*, the Secretary of the Interior approved the Citizen Potawatomi Nation's withdrawal of trust funds held by the Secretary of the Interior. After withdrawal, the funds maintained their status as trust funds, and are invested and managed by the Citizen Potawatomi Nation pursuant to a detailed Investment Management Policy. Under the Investment Management Policy, any use or expenditure of the judgment funds remains subject to the 1983 Agreement and the Ten-Year Plan. *See,* 25 U.S.C. § 4023(c).[2]

Thus, any expenditure of tribal judgment funds continues to be set forth in a budget developed by the Business Committee pursuant to the 1983 Agreement and the Ten-Year Plan, and submitted to

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[2] The Citizen Potawatomi Nation maintains the trust fund in a separate trust account held with the First National Bank & Trust in Shawnee, Oklahoma. The Citizen Potawatomi Nation's earnings from the trust fund that are to be expended for the year are placed in the Citizen Potawatomi Nation's General Fund account as a sub-account, and accounted for separately from the remainder of the Citizen Potawatomi Nation's General Fund monies. The trust funds must be audited on an annual basis by an independent certified public accountant and submitted to the Secretary of the Interior.

the general electorate of the Citizen Potawatomi Nation for vote and approval.

For the 2001 tax year, the Chairman of the Citizen Potawatomi Nation, a constitutionally elected tribal position, serving as the executive branch of the Citizen Potawatomi Nation, was petitioner John A. Barrett, Jr. Appendix, p. 43. The duties of the Chairman include general supervision of the daily affairs of the Citizen Potawatomi Nation. The daily affairs of the Citizen Potawatomi Nation include oversight, coordination and development of the various programs set forth in the 1983 Agreement and the Ten-Year Plan.

In 2001, the budget developed by the Business Committee and approved by the general electorate of the Citizen Potawatomi Nation included the payment of the salary of the Chairman from the trust funds. The Business Committee determined that the salary payments to the Chairman were not subject to federal or state income taxes as set forth in the 1983 Agreement and the Ten-Year Plan.

The Internal Revenue Service, after audit, found that the salary of the Chairman was subject to federal income tax and accordingly made an assessment based on the $48,057.66 paid to the Chairman by the Citizen Potawatomi Nation. The Chairman paid the tax, interest and penalties

assessed by the Internal Revenue Service and filed for refund with the District Court.[3]

The District Court held the salary to the Chairman was subject to federal income tax, finding that the express exemption set forth in the 1983 Agreement was for the benefit of the Citizen Potawatomi Nation. The District Court's opinion ignores that Indian tribes, as sovereigns, have never been subject to Federal income taxes.

The Tenth Circuit affirmed the District Court denial of the refund claim, finding that payment of a salary to the Chairman of the Citizen Potawatomi Nation is not an expenditure for "those activities and/or actions undertaken by the [Citizen Potawatomi Nation] to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the program of the [Citizen Potawatomi Nation] economically and/or socially and/or governmentally" as required by the 1983 Agreement and the Ten-Year Plan. The Tenth Circuit made this finding notwithstanding that the trust funds have increased from less than $4 Million to approximately $12 Million under the guidance and day-to-day oversight of the Chairman. The finding usurps the Congressionally mandated legislative and electoral processes of the Citizen Potawatomi Nation in

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[3] The issues in this case relate to Petitioner John A. Barrett, Jr. Petitioner Sheryl A. Barrett is a necessary party to these proceedings because she filed a joint income tax return for calendar year 2001 with Petitioner John A. Barrett, Jr.

budgeting and appropriating funds under the 1983 Agreement and the Ten-Year Plan.

In addition, the Tenth Circuit found that, assuming the functions and duties of the Chairman were within the tribal programming uses set forth in the 1983 Agreement and the Ten-Year Plan, because the recipient of such payment, *i.e.*, the Chairman, was not specified in the phrase "None of the funds distributed per capita or made available under this plan for programing [sic] shall be subject to Federal or State income taxes...," the payments to the Chairman were taxable.

This finding ignores the fact that no recipients are specified in the 1983 Agreement and the Ten-Year Plan. Moreover, the exemption from federal income tax is clearly expressed. The recital by the Tenth Circuit of general rules of interpretation that an exemption must be clearly expressed and cannot be granted by dubious inferences, and requiring that the recipient of the payments be specified in the exempting language, ignores the history and purposes of the mandate by Congress that specific expenditures for the broad categories of uses under the 1983 Agreement and the Ten-Year Plan be determined by the legislative and electorate processes of the Citizen Potawatomi Nation.

REASONS FOR GRANTING THE PETITION

I.

THE TENTH CIRCUIT DECISION UPHOLDS A BREACH OF AN AGREEMENT BETWEEN THE TRIBE AND CONGRESS, AND USURPS THE LEGISLATIVE AND ELECTORAL PROCESSES OF THE TRIBE AS MANDATED BY CONGRESS IN DIRECT CONTRAVENTION OF THE DECISIONS OF THIS COURT.

Congress and the Citizen Potawatomi Nation entered into an agreement for the use of judgment funds awarded by the Indian Claims Commission and appropriated by Congress. That agreement expressly provides that "None of the funds . . . made available under this plan for programing [sic] shall be subject to Federal or State income taxes . . ." Appendix, p. 41.

The decision of the Tenth Circuit upholds a breach of the agreement between the Citizen Potawatomi Nation and Congress by subjecting to taxation payments made by the Citizen Potawatomi Nation under the agreement, and usurps the legislation and electoral processes of the Citizen Potawatomi Nation by ignoring those processes which were mandated by Congress as a prerequisite to the use of the tribal judgment funds.

The United States recognizes the Citizen Potawatomi Nation as a domestic dependent sovereign and maintains a government-to-govern-

ment relationship with the Citizen Potawatomi Nation. 25 C.F.R. § 83.2. Under the Constitution, Indian relations are the "exclusive province of federal law." *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985). Congress, through exercise of its power under the Commerce Clause, is the sole source of this nation's policy for Indian affairs. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). This power is "plenary and exclusive." *U.S. v. Lara*, 541 U.S. 193, 124 S.Ct. 1628 (2004).

Congress has unilaterally developed and promoted a policy of tribal self-determination. *See, e.g.*, 25 U.S.C. § 1451; 25 U.S.C. § 450(a); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905 (1991); and *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 824 fn 9 (10th Cir. 2007) (various Acts of Congress, Executive Branch policies and judicial opinions have consistently reaffirmed the strong federal interests in promoting strong tribal economic development, self-sufficiency and self-governance).

Congress, acting pursuant to federal statutes and under the terms of the agreement it made with the Citizen Potawatomi Nation, appropriated funds settling the Citizen Potawatomi Nation's judgments awarded by the Indians Claims Commission for the taking of its land. As part of that agreement, the Citizen Potawatomi Nation set aside a portion of the funds to be programmed for tribal economic development, common tribal needs, educational requests,

and such other purposes as the affected tribe may justify. 25 U.S.C. § 1403(b)(5); Use and Distribution Plan of September 8, 1983, 48 FR 40567-01 (the "1983 Agreement"); and Ten-Year Tribal Acquisition, Development, and Maintenance Plan (the "Ten-Year Plan"). Appendix, p. 39-43.

The agreement the Citizen Potawatomi Nation made with Congress expressly exempted the judgment funds appropriated by Congress and used pursuant to the 1983 Agreement and the Ten-Year Plan from federal or state income taxes.

The scope of Congress' intended exemption of these funds from federal income taxes has to be measured against a back-drop made up of two basic, long-established principles: (1) The Citizen Potawatomi Nation, as a tribe, does not need the federal income tax exemption which Congress included in the agreement it made with the Citizen Potawatomi Nation; historically, Congress has never imposed income taxes on federally recognized Indian Tribes. *See*, F. Cohen, Handbook of Federal Indian Law, 231 (3d Ed. 1982); 26 U.S.C. § 7871; and Rev. Rul. 67-284, 1967-2 C.B. 55 (Income tax statutes do not tax Indian tribes. The tribe is not a taxable entity.), but (2) individual Indians, who are subject to income taxes, can be exempted by statutes, treaties, Congress' agreements with the Indian tribes, or Congress' enactments dealing with tribal affairs. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956); *Superintendent Five Civilized Tribes etc. v. Commissioner of Internal Revenue*, 295 U.S. 418, 55 S.Ct. 820 (1935); Rev. Rul. 59-354, 1959-2 C.B. 24; and Rev. Rul. 54-456, C.B. 1954-2.

In line with its policy of promoting tribal self-determination, Congress left to the Citizen Potawatomi Nation, as an exercise of the Citizen Potawatomi Nation's own sovereign powers, the selection and definition of specific expenditures of its income tax exempted funds. The 1983 Agreement required that the Citizen Potawatomi Nation legislatively adopt a budget for the use of the funds, and that such budget be approved by its general electorate. Appendix, p. 40.

As Congress intended, the Citizen Potawatomi Nation exercised its sovereign powers. By tribal legislation, the Citizen Potawatomi Nation appropriated part of its income tax exempted funds to pay a salary to Petitioner John A. Barrett, Jr. ("Barrett") for his service in the constitutionally required tribal office of chairman of the tribe. Appendix, p. 45. The duties of the Chairman include the day-to-day oversight of the development and execution of the various programs set forth in the 1983 Agreement and the Ten-Year Plan. Those programs expressly include "those activities and/or actions undertaken by the [Citizen Potawatomi Nation] to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the progress of the [Citizen Potawatomi Nation] economically and/or socially and/or governmentally."

In developing the budget for the trust funds held under the 1983 Agreement and the Ten-Year Plan, the Citizen Potawatomi Nation determined that the Chairman's duties were an integral part

thereof. Accordingly, the budget for the expenditure of the trust funds included salary for the Chairman for such duties. This budget was submitted to and approved by a vote of the citizens of the Citizen Potawatomi Nation. An intended result of these actions was the federal income tax exemption of the salary of the Chairman.

Relying on that, and the income tax exemption which Congress had mandated to be included in the agreement it made with the Citizen Potawatomi Nation, Barrett did not report his tribal salary as income.

The Internal Revenue Service determined that Barrett's salary was taxable income, claiming it did not fall within the exemption. The Internal Revenue Service imposed additional taxes and an accuracy penalty.

The Tenth Circuit upheld the Internal Revenue Service's position. By doing that it approved the breach of Congress' agreement with the Citizen Potawatomi Nation and permitted infringement on its sovereign legislative powers, in the following particulars:

A. Determining that the salary paid to Barrett, for his services as Chairman of the tribe, was not an expenditure for programmed tribal related acquisition, development and maintenance—and by making that determination the Tenth Circuit infringed on the Citizen Potawatomi Nation's sovereign legislative power to determine and define expenditures it would make for tribal economic

development, common tribal needs and other justifiable expenditures, as contemplated by 25 U.S.C. § 1403(b)(5) and the 1983 Agreement; and

B. Determining that the tax exemption that Congress and the Citizen Potawatomi Nation had agreed upon was not sufficiently specific to exempt the salary the Citizen Potawatomi Nation paid to Barrett — and by making that determination the Tenth Circuit upheld the breach of Congress' agreement with the Citizen Potawatomi Nation and eroded Congress' intent to use tribal expenditure of judgment funds as an integral part of its policy to promote tribal self-determination and the development of strong tribal governments.

There can be no doubt that the 1983 Agreement provides an exemption from federal income taxes. It expressly says so. And because Indian tribes, including the Citizen Potawatomi Nation, are exempt from Federal income taxes, the exemption is only applicable to the recipient of the funds as determined by the governmental processes of the Citizen Potawatomi Nation pursuant to the 1983 Agreement. In this case, the recipient of the funds was Barrett, the Chairman of the Citizen Potawatomi Nation.

II.

THE TENTH CIRCUIT DECISION IMPROPERLY CHILLS THE SOVEREIGN ACTION OF THE CITIZEN POTAWATOMI NATION BY ALLOWING A PENALTY TO BE IMPOSED FOR THE LEGITIMATE AND PROPER EXERCISE OF SOVEREIGN LEGISLATIVE POWER.

The penalties assessed in this case chill the Citizen Potawatomi Nation's ability to rely upon the agreement with Congress, and to use its sovereign power to appropriate income tax exempted funds, by permitting penalties for claiming an exemption that was authorized by federal statutes and by Citizen Potawatomi Nation legislation pursuant to those statutes.

A tribe has inherent sovereign powers and may exercise those powers within the confines of the tribe's constitution. *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079 (1978). Those powers include the power to direct its constitutionally required officials to take or not take certain actions. Additionally, a tribe has the power to pay or not pay its constitutionally required officials, and, if payment is made, the form of payment and conditions pursuant to which payment is made.

The Citizen Potawatomi Nation, through its legislative process, as approved by its general electorate, budgeted and appropriated funds to pay Barrett for his duties as Chairman of the Citizen Potawatomi Nation. The payments were from trust

funds awarded to the Citizen Potawatomi Nation by the Indian Claims Commission, which the Citizen Potawatomi Nation determined were impressed with a specific exemption from federal income tax.

Based thereon, Barrett did not report or pay federal income taxes on the funds received from the Citizen Potawatomi Nation. The Internal Revenue Service assessed penalties with respect to the payments made by the Citizen Potawatomi Nation to Barrett.

Imposition of penalties against Barrett can only be construed as a penalty against the Citizen Potawatomi Nation and an unlawful challenge to or restriction of the exercise of sovereign powers by the Citizen Potawatomi Nation.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

App. 1

BARRETT v. U.S.
No. 08-6017
561 F.3d 1140 (10th Cir. 2009)
Decided: April 6, 2009
United States Court of Appeals for the Tenth Circuit

JOHN A. BARRETT, JR. and SHERYL S. BARRETT,

Plaintiffs/Appellees,

v.

UNITED STATES OF AMERICA,

Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
HONORABLE JOE HEATON

John A. Barrett, Jr.[1] filed suit under 28 U.S.C. § 1346(a) against the United States seeking refund of the federal income taxes, penalties, and interest paid by him pursuant to an Internal Revenue Service ("IRS") assessment for the tax year ending December 31, 2001. Barrett timely appeals the district court's grant of summary judgment in favor of the United States. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm the district court's ruling that the salary paid to Barrett as chairman of

[1] Sheryl S. Barrett is also a captioned plaintiff-appellant because she and John Barrett were married in 2001 and filed a joint tax return. Her identity and activities are not otherwise relevant to Barrett's appeal.

the Citizen Potawatomi Tribe (the "Tribe")[2] was not exempt from federal income tax. We also affirm the district court's ruling on the accuracy-related penalty.

I

Barrett is a member of the Tribe and has been involved in the Tribe's governance since 1971. In 1985, Barrett was elected chairman of the Tribe at the annual meeting of the Tribe, and he has been re-elected to the chairmanship through to the present time. He held the chairmanship during the 2001 tax year.

The position of tribal chairman is included within the executive branch of the Tribe and encompasses various constitutional duties. The constitutional duties of the chairman include acting as head of the executive branch of the Tribe, general supervision of the daily affairs of the Tribe, seeing that the laws of the Tribe are faithfully enforced, and presiding over meetings of the various governmental bodies of the Tribe. The constitution of the Tribe also provides for a separately elected judicial branch, and a legislative branch called the Business Committee. The Business Committee is comprised of the following elected positions: chairman, vice chairman, secretary/treasurer, and two councilmen. Persons elected to these positions are all elected by the Tribe at its annual meeting. The functions of the

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[2] The Citizen Potawatomi Tribe was formerly known as the Citizen Band Potawatomi Indian Tribe and is a federally recognized tribe of American Indians.

Business Committee include developing a budget for the Tribe's funds and appropriating funds for the day-to-day operations of the Tribe. As regards the compensation paid to the chairman of the Tribe, the Business Committee budgets funds and appropriates the compensation to be paid.

In the late 1940s and early 1950s, the Tribe brought various claims against the United States before the Indian Claims Commission. These claims were brought pursuant to the Indian Claims Commission Act, 25 U.S.C. §§ 70-70v-3 (1946) (repealed). This remedial legislation was passed to settle "claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands or compensation agreed to by the claimant." 25 U.S.C. § 70a. As a result of these claims, the Tribe was awarded judgments against the United States in the 1970s and 1980s, which were held in trust by the Secretary of the Interior.

The Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. §§ 1401 *et seq.* (the "Distribution Act") governed the distribution of the judgment awards to the Tribe. Pursuant to the Distribution Act, the Tribe and the Secretary of the Interior developed a use and distribution plan which became final and was published in the Federal Register on September 8, 1983 (the "1983 Plan"). 48 Fed. Reg. 40567-01 (Sept. 8, 1983).

Under the 1983 Plan, 70 percent of the funds were distributed pro rata to the members of the

Tribe, and 30 percent of the funds were set aside for programming, to be held in perpetual trust by the Secretary of the Interior, with the income from such funds to be used for real estate acquisition, development of the Tribe, including increasing the effectiveness of the government, and the maintenance of the property of the Tribe. As required by the Distribution Act, *see* 25 U.S.C. § 1407 (stating that "none of the funds which – (1) are . . . held in trust pursuant to a plan approved under the provisions of this chapter . . . shall be subject to Federal or State income taxes"), the 1983 Plan states: "None of the funds distributed per capita or made available under this plan for programming shall be subject to Federal or State income taxes." 1983 Plan, § 6(b).

The 1983 Plan provided that programming funds (*i.e.*, the 30 percent trust fund set asides) were to be used pursuant to a Ten-Year Tribal Acquisition, Development, and Maintenance Plan ("Ten-Year Plan").[3] The 1983 Plan specified that the Ten-Year Plan should include as uses for the funds "the acquisition of additional lands to build upon the tribal land base, the development of the tribe's assets and to provide for the maintenance and care of the tribal property." 1983 Plan, § 5(d). The 1983 Plan further provided that "[a]t the end of the 10-year program period, the [Tribe] shall evaluate the tribal needs as concerns the remaining balances in the program principal and interest accounts, and

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[3] The United States has referred to the Ten-Year Plan in its briefing as the "1985 Guidelines."

any changes proposed by the [Tribe] shall be subject to approval by the Secretary." 1983 Plan, § 5(d)(iii).

As required by the 1983 Plan, the Tribe and the Secretary of the Interior developed the Ten-Year Plan. The Ten-Year Plan defined the terms "acquisition," "development" and "maintenance," as used in the 1983 Plan. "Development" is defined as "those activities and/or actions undertaken by the Tribe to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the program of the Tribe economically and/or socially and/or governmentally." Ten-Year Plan, § 1.4.

In 1994, the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001 *et seq.*, was passed, which, inter alia, allowed tribes to withdraw and manage any trust funds held by the Secretary of the Interior on their behalf, subject to the approval of the Secretary of the Interior. In 1995, the Tribe members voted to withdraw all trust funds from the control and management of the Secretary of the Interior, and to place control and management of the trust funds with the Tribe. After withdrawal, the funds maintained their status as trust funds. In 1996, the Business Committee of the Tribe passed Resolution 96-44, which authorized Barrett, as the chairman of the Tribe, to effectuate the transfer of the management of the trust funds from the Secretary of the Interior to the Tribe, pursuant to management policies and guidelines that were to be approved by the Secretary of the Interior.

As part of the Tribe's request for approval of self-management of the trust funds, the Tribe also submitted for approval a detailed Investment Management Policy for the investment and use of the trust funds. Under the Investment Management Policy, the purposes and uses for the expenditure of the earnings withdrawn from the trust, pursuant to the annual budget approved by the electorate, remained the same as those in effect during the Secretary of the Interior's tenure as manager of the trust funds (*i.e.*, to acquire real estate, develop the Tribe, and maintain Tribe property).

In 1996, the Secretary of the Interior approved the transfer of the trust funds to the Tribe, subject to the Tribe's use and management of the funds in a manner consistent with the Investment Management Policy. The Tribe now maintains the trust fund in a separate trust account held with the First National Bank & Trust Company.[4] The Tribe's trust fund earnings which are to be expended for the year are placed in the Tribe's general fund account as a subaccount, and accounted for separately from the Tribe's general fund monies. Any earnings from the trust fund that are not included in the budget, or approved for expenditure by the general membership of the Tribe, remain in the trust fund and become part of the principal of the trust fund. The Secretary of the Interior requires the Tribe to hire an independent auditor to perform a yearly audit of the

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[4] Barrett is chairman of the board of directors of the First National Bank & Trust Company.

trust funds. When completed, the Tribe submits the audit report to the Secretary of the Interior.

In 1996, Barrett concluded that his salary as chairman could be paid from the earnings on the Tribe's trust fund, and that he would not be taxed on that income. Barrett suggested to the Business Committee of the Tribe that he be paid from those funds, and then he informed the accounting department of this plan. Barrett also instructed the accounting department not to withhold taxes from his compensation and not to issue a Form W-2 to him. In 2001, Barrett received $48,057.64 in compensation from the Tribe for his duties as chairman. This compensation was paid from the trust funds which had been previously managed by the Secretary of the Interior but were now self-managed by the Tribe. The Business Committee of the Tribe, with the approval of the Tribe's general electorate at its annual meeting, directed that the chairman's compensation be paid from the trust funds. After the completion of an audit, the IRS determined that compensation paid to Barrett by the Tribe was taxable income to Barrett. In June 2005, the IRS issued a notice of deficiency proposing to assess Barrett for additional income taxes for the 2001 tax year. The proposed assessment by the IRS was for income taxes in the amount of $19,355 and penalties of $3,871, pursuant to 26 U.S.C. §6662. These amounts were ultimately assessed by the IRS, and, after payment of all amounts assessed in September 2005, Barrett, in March 2006, requested a refund of the amounts paid pursuant to assessments relating to the compensation which had

been paid to Barrett as chairman of the Tribe in tax year 2001.[5] In May 2006, the IRS denied Barrett's refund claim, and Barrett filed his complaint in the district court in September 2006, seeking review of the IRS' denial of his refund claim.

On cross-motions for summary judgment, the district court denied Barrett's motion and granted the motion of the United States. In its order, the district court rejected Barrett's argument that the compensation paid by the Tribe was exempt from income tax because it fell within the 1983 Plan's definition of "development" or that the compensation paid to Barrett was a "programming expenditure" under the 1983 Plan. The district court also found that the penalty should be sustained because, while there might be a factual question as to Barrett's subjective good faith, Barrett had not presented sufficient evidence to create a triable issue of fact as to the objective reasonableness of his position regarding the taxability of his salary.

II

A. Standard of Review

We review the district court's summary judgment decision de novo, applying the same legal standard used by the district court. *ClearOne Commc'ns. Inc. v. Nat'l Union Fire Ins. Co.*, 494 F.3d

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[5] Barrett's claim for a refund was timely under 26 U.S.C. § 6511 (a), which provides a two-year limitations term, running from the date of payment of the tax.

1238,1243 (lOth Cir. 2007). Under this standard, summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is 'genuine' if the evidence allows a reasonable jury to resolve the issue either way and is 'material' when it is essential to the proper disposition of the claim." *Haynes v. Level 3 Commc'ns. LLC,* 456 F.3d 1215, 1219 (lOth Cir. 2006) (internal quotation omitted). When reviewing a grant of summary judgment on appeal, we construe all factual inferences in favor of the party against whom summary judgment was entered. *NISH v. Rumsfeld,* 348 F.3d 1263, 1266 (lOth Cir. 2003).

B. Exemption from Federal Income Tax

Barrett acknowledges that American Indians, as United States citizens, generally are subject to the federal income tax. *See Squire v. Capoeman,* 351 U.S. 1, 6 76 S.Ct. 611, 100 L.Ed 883 (1956) ("Indians are citizens and ... in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens."). Barrett claims, however, that his compensation as chairman is not taxable income because the source of the funds used to pay him was trust fund money previously awarded by the Indian Claims Commission to the Tribe, and that funds received from that source are tax exempt. Aplt. Br. at 15.

Under the Internal Revenue Code, gross income is "all income from whatever source derived," 26 U.S.C. § 61(a), and an exemption from the payment of taxes "should be clearly expressed," *Squire*, 351 U.S. at 6. *See also Allen v. Comm'r*, 91 T.C.M. (CCH) 673 (2006), aff'd, 204 F. App'x 564 (7th Cir. 2006) (unpublished) ("It is well established that Native Americans, or American Indians, as U.S. citizens, are subject to the Federal income tax unless an exemption is created by treaty or statute. For such an exemption to be valid, it must be based upon clearly expressed language in a statute or treaty." (internal citations omitted)). Barrett claims the 1983 Plan's specification that none of the funds "made available under this plan for programming shall be subject to Federal or State income taxes," 1983 Plan, §6(b), is an express exemption for his compensation because his compensation was paid from the programming funds. Specifically, Barrett argues that his compensation as the chairman of the Tribe furthers the "development" of the Tribe, defined in the Ten-Year Plan as the "growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the progress of the Tribe," Ten-Year Plan, § 1.4. Barrett argues that the chairman's oversight of the Tribe's day-to-day operations is one way of developing "strong and stable tribal governments," Aplt. Br. at 17, which helps achieve the government's expressed goal of "promoting strong tribal economic development, self-sufficiency, and self-governance," *id.* at 18 (citing the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.*, the Indian Financing Act of 1974,25 U.S.C. §§ 1451 *et seq.*, *Okla. Tax Comm'n v. Citizen Band Potawatomi*

Indian Tribe of Okla., 498 U.S. 505, 510 (1991), and *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818,824 n.9 (10th Cir. 2007), as examples in support of the government's "consistent" stated goal of tribal self-sufficiency). Barrett contends the compensation paid to him as chairman fits within the programming aspect of the 1983 Plan, and as such, the express language of the 1983 Plan that exempts the programming funds from tax also exempts his compensation from tax.

We disagree. The express exemption authorized by Congress, for funds "made available under this plan for programing," 1983 Plan, § 6(b), does not encompass the compensation paid to Barrett as the chairman of the Tribe. The funds available under the 1983 Plan for programming were the funds authorized by the Ten-Year Plan. The Ten-Year Plan authorized the use of the funds for acquisition, development and maintenance. Barrett argues his compensation falls within the definition of development, but the Ten-Year Plan defines development as "those activities and/or actions undertaken by the Tribe to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the progress of the Tribe economically and/or socially, and/or governmentally." Ten-Year Plan, § 1.4. Barrett's compensation for the oversight of day-to-day operations cannot be considered development under the expressed definition of the term. Payment of a salary to Barrett, who filled the long-standing and long-defined position of tribal chairman is not an expenditure for an "evolutionary process toward

the progress of the Tribe economically and/or socially, and/or governmentally."

In addition, even if the compensation paid to Barrett as chairman of the Tribe would satisfy the intended-use criteria of the programming funds, the tax exemption reference in the 1983 Plan is not sufficiently specific to exempt Barrett's salary from federal taxation. *See Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 156 (1973) (noting that the Supreme Court "has repeatedly said that tax exemptions are not granted by implication" and that if Congress intends a tax exemption, "it should say so in plain words. Such a conclusion can not rest on dubious inferences" (internal quotations omitted)). If the annual compensation paid to a tribal chairman was to be exempt from taxation, it could have been easily and plainly expressed. As a result, because Barrett's compensation was not expressly exempt from federal income tax, the district court was correct to grant summary judgment in favor of the United States on Barrett's claim for a refund.[6]

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[6] Providing further support, multiple decisions from the Tax Court have held that amounts received by Native Americans for serving as tribal officials are not exempt from tax. *See Allen v. Comm'r,* 91 T.C.M. (CCH) 673 (2006), aff'd, 204 F. App'x 564 (7th Cir. 2006) (unpublished) (concluding the chairman of tribe was liable for tax on his salary and the fact that the tribe is a non-taxable entity was irrelevant); *Doxtator v. Comm'r,* 89 T.C.M. (CCH) 1270 (2005) (concluding the tribal official was subject to income tax on compensation received for rendering services to tribe because no exemption was found); *Allen v. Comm'r,* T.C. Memo 2005-118 (2005) (concluding that payments to tribal executive assistant were taxable income because no treaty or legislation exempted the payments);
(footnote continued on next page)

Although Barrett cites sources which emphasize the government's strong desire for American Indians to progress toward tribal self-sufficiency, this goal does not trump the long-standing requirement that an exemption from the payment of taxes must be explicitly stated. *See Okla. Tax Comm'n,* 498 U.S. at 510 (noting "Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development" and therefore refusing to "modify the long-established principle of tribal sovereign immunity" (internal quotations omitted)); *Squire,* 351 U.S. at 6-7 (recognizing that the United States has authority to tax American Indian U.S. citizens as long as there is no express exemption from tax).

C. *Accuracy-Related Penalty*

Section 6662 of the Internal Revenue Code imposes a 20 percent accuracy-related penalty on the portion of underpayment of tax attributable to negligence or disregard of rules or regulations. See 26 U.S.C. §§ 6662(a) (mandating a tax "equal to 20

Hoptowit v. Comm'r, 78 T.C. 137, 145-48 (1982), aff'd, 709 F.2d 564 (9th Cir. 1983) (concluding that a tribal council member was liable for tax on payments received from the tribe's trust funds); *Jourdain v. Comm'r,* 71 T.C. 980, 987 (1979), aff'd, 617 F .2d 507 (8th Cir. 1980) (concluding that a tribal chairman's salary paid from tribal trust funds is taxable to the tribal chairman). Although none of these cases has the same facts and purported exemption from tax as that urged herein, see Aplt. Reply Br. at 7-9 (discussing how cases are factually dissimilar), they provide support for our holding because they all refuse to find an exemption where none is expressly provided.

percent of the portion of the underpayment"), 6662(b)(1) (applying penalty for "[n]egligence or disregard of rules or regulations").

The "negligence" contemplated by the statute is "any failure to make a reasonable attempt to comply with the provisions" of the tax law. *Id.* § 6662(c). "Negligence is defined as the 'lack of due care or failure to do what a reasonable or ordinarily prudent person would do under the circumstances.'" *Van Scoten v. Comm'r*, 439 F.3d 1243, 1252 (10th Cir. 2006) (quoting *Anderson v. Comm'r*, 62 F.3d 1266, 1271 (10th Cir. 1995)).

The term "disregard" includes "any careless, reckless, or intentional disregard of rules or regulations." Treas. Reg. § 1.6662-3(b)(2). Disregard of rules or regulations is careless if "the taxpayer does not exercise reasonable diligence to determine the correctness of a return position" and is reckless if "the taxpayer makes little or no effort to determine whether a rule or regulation exists, under circumstances which demonstrate a substantial deviation from the standard of conduct that a reasonable person would observe." Treas. Reg. § 1.6662-3(b)(2); see also *Neely v. Comm'r*, 85 T.C. 934, 947 (1985) (stating that negligence is lack of due care or failure to do what a reasonable person would do under the circumstances).

Under § 6664(c)(1), however, no penalty will be imposed "if it is shown that there was a reasonable cause for such [underpayment] and that the taxpayer acted in good faith with respect to such [underpayment]." 26 U.S.C. § 6664(c)(1) (emphasis

added). "The determination of whether a taxpayer is entitled to [this] exception 'is made on a case-by-case basis, taking into account all pertinent facts and circumstances.'" *Van Scoten,* 439 F.3d at 1259 (quoting Treas. Reg. § 1.6664-4(b)(1)). "Reasonable cause and good faith might be indicated by 'an honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge, and education of the taxpayer,' but 'reasonable cause and good faith is not necessarily indicated by reliance on facts that, unknown to the taxpayer, are incorrect.'" *Id.* (quoting same).

Regarding the imposition of penalties in cases commencing after July 22, 1998, § 7491(c) places the burden of production on the IRS, "in any court proceeding with respect to the liability of any individual for any penalty." 26 U.S.C. § 7491(c). As a result, the government had the burden of coming forward in the district court with sufficient evidence to support imposition of a penalty on Barrett. *Higbee v. Comm'r,* 116 T.C. 438, 446 (2001).

Barrett argues that the district court erred by not requiring the United States to meet its burden of production under § 7491(c). Aplt. Br. at 24-26. The United States responds that the facts stipulated by the parties were sufficient to meet the government's burden of production, but in its briefing points to no specific stipulations at all, let alone stipulations which fall within the definition of negligence

outlined above.[7] *See* Aple. Br. at 27. The district court addressed the summary judgment motions regarding the penalty by analyzing "whether the plaintiffs have set out sufficient evidence to create a material fact question as to the propriety of the accuracy-related penalty under 28 U.S.C. Sec. 6662." Aplt. Br. Ex. A at 10. The district court then set out the legal standards for the imposition of a penalty, but never addressed the United States' burden of production to show negligence. The district court simply addressed whether Barrett had met the "reasonable cause and good faith" exception to the negligence standard permitted by § 6664(c)(1). Id. at 11-14.

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[7] At oral argument, the United States argued its burden of production was met by merely establishing that the income received by the taxpayer was taxable and was not disclosed, citing *Allen v. Comm'r*, 2005 T.C.M. 118 (RIA) (2005). However, the penalty provision at issue in Allen was 26 U.S.C. § 6662(b)(2). Section 6662(b)(2) provides for an accuracy-related penalty for any "substantial understatement" of income tax. A "substantial understatement" occurs when "the amount of the understatement for the taxable year exceeds the greater of-(i) 10 percent of the tax required to be shown on the return for the taxable year, or (ii) $5,000." 26 U.S.C. § 6662(d)(1)(A)(i)-(ii). Therefore, the United States met its burden of production in *Allen* by showing an underpayment had occurred and by simply pointing out the amount of the underpayment.

Here, § 6662(b)(1) negligence, not § 6662(b)(2) "substantial understatement," is at issue. Therefore, *Allen* is not persuasive authority for concluding that Barrett's failure to report his compensation as taxable income is sufficient to meet the United States' burden on § 6662(b)(1) negligence.

However, because we are convinced that the record adequately supports the imposition of the accuracy-related penalty, and because the parties have had a fair opportunity to address whether the penalty should apply, we affirm the district court. *See Thomas v. City of Blanchard*, 548 F.3d 1317, 1327 n.2 (10th Cir. 2008) (holding that "we can affirm on any ground adequately supported by the record 'so long as the parties have had a fair opportunity to address that ground'" (quoting *Shero v. City of Grove*, 510 F.3d 1196, 1201 n.2 (10th Cir. 2007))). The parties contested the imposition of the accuracy-related penalty, and the related burden of production, in their summary judgment briefings. E.g, ROA Vol. II at 276-79 (United States' memorandum in support of motion for summary judgment; recognizing burden of production on penalty and arguing that Barrett was liable for the penalty because he intentionally failed to disclose his income despite the lack of authority supporting his position); *id.* at 331-32 (Barrett's cross-motion for summary judgment; recognizing that the United States has the penalty burden of production and arguing the United States' burden had not been met); *id.* at 359-61 (Barrett's response to the United States' motion for summary judgment; arguing that United States failed to meet its burden of production); *id.* at 384-88 (United States' response to the penalty portion of Barrett's cross-motion for summary judgment).

We may infer from the parties' stipulation of facts that Barrett relied only on his personal reading of the law to form the conclusion that his compensation was nontaxable. See ROA Vol. I at 28,

¶37 ("On or after 1993, Barrett became aware of certain rulings of the Internal Revenue Service, including Revenue Ruling 59-354 regarding the taxability of amounts paid to tribal council members or otherwise exempt by statute or treaty. In 1996, Barrett concluded that he could be paid from the earnings accrued from the Tribe's trust fund and that he would be exempt from taxes from such income, so he suggested to the Business Committee that he be paid from the trust fund."). A reasonable taxpayer in Barrett's position would not rely solely on his or her own analysis of the law to conclude his compensation was exempt. He was confronted with complicated legal authority, compensation is normally taxed, and he did not seek professional advice. The evidence was sufficient to sustain the United States' burden of production.

We also affirm the district court's finding that Barrett had not shown reasonable cause for the underpayment of his taxes, and therefore did not rebut the United States' showing on the accuracy-related penalty.[8] The district court found:

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[8] The district court stated that if the penalty question turned only on Barrett's subjective good faith, it would likely conclude that this would create a fact issue. ROA Vol. II at 407-08. Because we affirm the district court on the "reasonable cause" prong, we need not reach the "good faith" prong of the 26 U.S.C. § 6664(c)(1) exception to the imposition of an accuracy-related penalty. See 26 U.S.C. § 6664(c)(1) (stating that no penalty will be imposed "if it is shown that there was a reasonable cause for such [underpayment] and that the taxpayer acted in good faith with respect to such [underpayment]" (emphasis added)).

The only authority to which the plaintiffs point in justifying the reasonableness of their filing was their reading of Revenue Ruling 59-384, particularly its reference to income potentially being exempt due to treaties or statutes, and their reading of the various statutes and plans adopted pursuant to them. However, the referenced revenue ruling clearly points out the general principles of law applicable in this area: that payments to tribal members are includable in the member's gross income unless an exemption "derive[s] plainly" from a statute or treaty. The relatively convoluted argument upon which the plaintiffs rely to trace their theory of nontaxability cannot be said to be "plain" by any stretch. Not only is it contrary to the general principles of taxability of payments to tribal members, but it also substantially misreads the statutes in question, taking provisions of them which are directed to taxation of the Tribe and applying them instead to taxation of the recipients of tribal funds. It applies various tax exemption provisions in ways and contexts outside their proper scope. In any event, the court concludes that the plaintiffs' position as to the tax treatment of Barrett's salary, though inventive, is outside the bounds of what can be termed objectively reasonable.

> Under these circumstances, the court concludes that the underpayment was attributable to negligence or disregard and the penalty was therefore properly imposed.

ROA Vol. II at 408-09 (internal footnotes omitted).

The determination of reasonable cause and good faith is made on a case-by-case basis, taking into account all pertinent facts and circumstances. Treas. Reg. § 1.6664-4(b)(1). The most important factor is the extent of the taxpayer's effort to assess the proper tax liability. *Id.* "Circumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge, and education of the taxpayer." *Id.*

For substantially the same reasons expressed by the district court, we conclude that Barrett did not establish reasonable cause for the underpayment of taxes, and therefore did not rebut the United States' showing on the accuracy-related penalty. Barrett's determination that the salary paid to him as chairman of the Tribe was exempt from federal income tax is not reasonable in light of Barrett's experience, knowledge, and education. Barrett made no effort to ascertain his tax status beyond his own interpretation of the convoluted, historical legislation, revenue regulations, and tribal treaties. Barrett's efforts to assess his proper tax liability for his salary as chairman were incredibly minimal -- almost non-existent. As a result, Barrett has raised no genuine issue of material fact with respect to

reasonable cause for his tax underpayment, and the district court was correct to grant summary judgment in favor of the United States on the accuracy-related penalty.

We AFFIRM the district court's order granting summary judgment to the United States.

FILED DECEMBER 5, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JOHN A. BARRETT, JR. and
SHERYL S. BARRETT,

Plaintiffs,

v. Case No. CIV-06-0968-HE

UNITED STATES OF AMERICA,

Defendant.

ORDER

The Internal Revenue Service ("IRS") determined plaintiffs John and Sheryl Barrett failed to report, on their joint 2001 federal income tax return, certain taxable wages John Barrett received in that year. The IRS assessed additional federal taxes, plus a penalty and interest, which the plaintiffs paid. After the IRS denied their claim for refund, the plaintiffs filed this action claiming an overpayment of $38,623.73. Both parties have moved for summary judgment. They stipulated to the

following facts, some of which are pertinent only as background information.[9]

John Barrett ("Barrett") is a member of the Citizen Potawatomi Nation f/k/a Citizen Band Potawatomi Indian Tribe ("Tribe"), a federally recognized tribe of American Indians. He attended Princeton University and Oklahoma City University, graduating with a degree in business. Barrett has been the Chairman of the Tribe since 1985, having been repeatedly reelected by the Tribe's general membership.[10] Apart from his activities with the Tribe, Barrett has been successful in various business activities and is involved in the oil and gas, cattle and land development businesses. The Tribe's Constitution specifies the duties of the Chairman and also provides for a Business Committee, which consists of the Chairman, Vice Chairman, Secretary/ Treasurer and two Councilmen, all of whom are elected by the Tribe at their annual meeting. While the Tribe had minimal funds and land in 1971, today

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[9] A few additional facts, taken from the Plan for the Use and Distribution of the Potawatomi Nation Judgment funds, 48 FR 405671, and exhibits to the stipulation, have been included with those from the stipulation. Despite the stipulation, the plaintiffs included a statement of undisputed material facts in their brief. The defendant disputes several of their factual statements, but only one ¶20) requires discussion here. It is addressed subsequently in this order.

[10] Barrett initially worked only about twenty hours per week as Chairman. The stipulation indicates the Tribe employed an administrator to manage the Tribe's office until 1996, when Barrett assumed the duties of Chairman on a full-time basis. Apparently, the administrator's position was not formally abolished until 2002. Stipulation, ¶¶35, 36; Exhibit 8.

it has a multi-million dollar annual cash flow and fourteen separate businesses which it operates. The Tribe manages thirty contracts for the United States government and owns and operates the First National Bank & Trust Company, Shawnee, Oklahoma. Barrett serves as the Chairman of the Bank's Board of Directors.

In the late 1940's and early 1950's, the Tribe sought compensation for the federal government's taking of Indian lands without payment or without payment of the agreed compensation. Claims were filed with the Indian Claims Commission ("Commission") pursuant to the Indian Claims Commission Act, 25 U.S.C. §§ 70-7Ov-3. The Commission made awards with respect to some of the claims in the mid-to-late 1970's. Eighty percent of those awards were distributed pro-rata to all members of the Tribe in accordance with a distribution plan approved by the Secretary of the Interior of the United States ("Secretary"). The remaining twenty percent were to be held in perpetual trust by the Secretary, "with the income from such funds to be used for specific activities of the Tribe, including health aids, prosthetics and scholarships." Stipulation ¶17. The Tribe budgeted and disbursed monies from the trust funds to qualifying members of the Tribe for health aids, prosthetics and scholarships. Those disbursements were not taxable income to the recipients. The Commission made awards for the remaining claims in the 1980's. Under another distribution plan ("1983 Plan" or "Plan") approved by the Secretary, seventy percent of these awards were distributed pro-rata to all members of the Tribe. The remaining thirty percent of the awards ("set-

aside funds"), allotted to the programming aspect of the Plan, were to be used "in a Ten-Year Tribal Acquisition, Development, and Maintenance Plan." 48 FR 40567, ¶5(d). These funds were to be "held in perpetual trust by the Secretary of Interior, with the income from such funds to be used for real estate acquisition, development of the Tribe, including increasing the effectiveness of the Government, and the maintenance of the property of the Tribe."[11] Stipulation ¶19. The Plan provided that "[n]one of the funds distributed per capita or made available under this plan for programing shall be subject to Federal or State income taxes ..." 48 FR 40567, ¶6(b). The Secretary approved a budget and guidelines ("Guidelines") for the expenditure of the set-aside funds on January 2, 1985. Stipulation, Exhibit 3. The Guidelines defined the terms acquisition, development and maintenance. *Id.* Development is defined as "those activities and/or actions undertaken by the Tribe to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the progress of the Tribe economically and/or socially, and/or governmentally." *Id.* § 1.4. The Tribe voted yearly on how the income earned from the

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[11] At the end of the ten year period the General Council was to "evaluate tribal needs as concerns the remaining balances in the program principal and interest accounts" with any changes proposed being subject to the Secretary's approval. 48 FR 40567 ¶5(d)(iii).

trust funds maintained by the Secretary would be spent.[12]

After passage of the American Indian Trust Fund Management Reform Act of 1994, the Tribe voted to take control of, and manage, the trust funds.[13] In 1996, the Business Committee authorized the Chairman to effectuate the transfer of the trust funds' management to the Tribe. The Secretary approved the Tribe's removal of the trust funds, subject to their use and management consistent with an Investment Management Policy the Tribe had submitted to the Secretary.[14] *See* Stipulation, Exhibit 5.

The Tribe maintains the trust fund in a separate trust account. Earnings from the fund that are to be spent each year are placed in the Tribe's general fund account as a sub-account. The Business Committee determines how the earnings are spent, subject to the approval of the Tribe.

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[12] The Guidelines provided that the programming aspect of the distribution plan would be operated from interest earnings only, unless it was absolutely necessary to invade the principal. Stipulation, Exhibit 3, ¶1.3.

[13] The funds retained their trust fund status after withdrawal.

[14] Under the investment management policy, the earnings withdrawn from the trust were to be used for the same purposes as when the trust funds were managed by the Secretary - "for medical devices (i.e. prosthetics, dentures, eyeglasses), higher education/scholarships and a general purpose investment fund." Stipulation, Exhibit 5, §I(B)(2).

Stipulation, Exhibit 1, Article 5, § 3, Exhibit 5, § X. The principal is not to be invaded and earnings not included in the Tribe's budget become part of the fund's principal. The Secretary requires that the trust funds be audited yearly by an independent auditor.

Sometime after 1992, Barrett became aware of certain rulings of the IRS, including Revenue Ruling 59-354.[15] He concluded, in 1996, that he could be paid from earnings accrued from the Tribe's trust fund and that such income would be nontaxable. Barrett suggested to the Business Committee that he be paid from the trust fund and contacted the Tribe's accounting department, informing it that the Business Committee had decided that he would be paid from the sub-account in the General Fund. That account held amounts earned from the trust fund monies that had been budgeted for the Tribe's use. Barrett directed the accounting department not to withhold taxes from his compensation and not to issue him a W-2 form.

In 2001, the plaintiffs did not include in their reported income the sum of $48,057.64 that Barrett was paid out of the trust fund earnings for the work

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[15] Revenue Ruling 59-354 determined that compensation for the duties performed by elected tribal council members should be excluded from the definition of "wages" for purposes of a tribe's obligations as to FICA, FUTA, and income tax withholding. *See Doxtator v. Comm'r*, 89 TCM (CCH) 1270, 2005 WL 1163978 (2005). The significance of the ruling is discussed subsequently.

he performed as Chairman of the Tribe.[16] The IRS subsequently determined that compensation to be taxable income and issued a Notice of Deficiency on June 16, 2005. The IRS assessed additional income taxes in the amount of $19,355.00, a penalty of $3,871.00, and accrued interest in the amount of $2,552.47 against the plaintiffs. The plaintiffs paid these amounts, plus an additional sum which was applied as an overpayment to their 2004 tax year. The plaintiffs requested a refund of the amounts paid that related to the Barrett's compensation as Chairman. The IRS denied the refund claim in full and the plaintiffs filed this lawsuit.

Discussion

The case presents two issues: whether the compensation Barrett received in the year 2001, as the Tribe's Chairman, is taxable income to him and, if so, whether the plaintiffs are liable for the penalty assessed pursuant to 26 U.S.C. § 6662. While the plaintiffs acknowledge that American Indians, as U.S. citizens, generally are subject to the federal income tax, they claim the compensation is not taxable income because the source of the funds used to pay Barrett was trust fund monies previously awarded by the Indian Claims Commission to the Tribe. The plaintiffs assert that those funds "have been impressed with tax exemption to their recipients," and "[t]he Tribe, as a governmental act,

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[16] For the 2001 tax year, the plaintiffs reported an adjusted gross income of $789,495.00 and a total tax liability of $266,013.00, which was paid in full.

has made the conscious decision to pay the Chairman from these funds." Plaintiffs' motion, p. 2.

The compensation Barrett received is taxable income "unless an exemption is created by treaty or statute." *Allen v. Comm'r,* 91 TCM (CCH) 673, 2006 WL 177408, at *2 (2006), *affd,* 204 Fed.Appx. 564 (7th Cir. 2006); *see also Squire v. Capoeman,* 351 U.S. 1 (1956). Plaintiffs assert that because the 1983 Plan specified that none of the funds "made available under this plan for programming shall be subject to Federal or State income taxes," Congress, by approving the Plan,[17] exempted funds paid for programming from taxation. They claim that the compensation Barrett received fell within the 1985 Guideline's definition of "development," which definition was "carried forward under the Investment Management Policy to the current funds held by the Tribe ....." *See* plaintiffs' motion, pp. 19-20; Plaintiffs' statement of undisputed material facts, ¶20.[18]

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[17] A distribution plan became effective unless, within sixty days after its submission to Congress, a joint resolution was enacted disapproving it.

[18] Citing Barrett's affidavit, the plaintiffs contend that "[u]nder the Investment Management Policy, the purposes and uses for the expenditure of the earnings withdrawn from the trust pursuant to the annual budget approved by the electorate remained the same as those in effect during the trust management tenure of the Secretary of the Interior." Plaintiffs' motion, Statement of Undisputed Material Facts, ¶20. The defendant disagrees. See defendant's response, pp. 1-2.

While Congress, by its inaction, approved the 1983 Plan, there is no evidence that it also approved the Guidelines. The Guidelines, through its definitions of pertinent terms, could not expand the income exemption created by Congress. The 1983 Plan is consistent with the Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. §§1401-1408, which provides that "[n]one of the funds which (1) are distributed per capita or held in trust pursuant to a plan approved under the provisions of this chapter, ... including all interest and investment income accrued thereon while such funds are so held in trust, shall be subject to federal or State income taxes ...." 25 U.S.C. § 1407. The programming expenditures contemplated in the Plan are the Tribe's purchase of assets and investments to be held in trust for the Tribe. *See* 48 FR 40567 § 5(d) ("The funds for the programing aspect (30%) shall be utilized in a Ten-Year Tribal Acquisition, Development, and Maintenance Plan. The 10-year plan shall include the acquisition of additional lands to build upon the tribal land base, the development of the tribe's assets and to provide for the maintenance and care of the tribal property ...."). Compensation paid to Barrett ceased to be held in trust by the Tribe at the point it was so paid and, in any event, was not a "programming expenditure" as that term is used in the 1983 Plan.

Even if the monies Barrett received could conceivably be considered as an exempt expenditure under the 1983 Plan, the court agrees with the defendant that the Plan and the accompanying Guidelines pertain only to the Tribe's use of the funds in conjunction with its "Ten-Year Tribal

Acquisition, Development, and Maintenance Plan," and do not apply to any distributions after the 1983 Plan expired. The Investment Management Policy, which governed the disbursement of trust fund earnings in 2001, neither refers to the 1983 Plan[19] or the Guidelines nor incorporates any of their provisions or definitions.[20] Nothing in that document indicates an intent to exempt wage disbursements from taxation or to include the broad definition of "development" on which the plaintiffs rely.[21]

The plaintiffs cite no other basis for their claimed tax exemption and cite no authority that supports their argument that Barrett's compensation was nontaxable income. Case authority is to the

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[19] The 10-year Plan is mentioned in Exhibit C to the Investment Management Policy, with respect to amounts projected to be withdrawn from the Tribe's investment trust.

[20] As the plaintiffs assert in their reply brief, the Investment Management Policy did state that "[t]he purpose and use of the earnings from the Investment Accounts, will continue to be consistent with the original claims settlements ...." Stipulation, Exhibit 5, p.2. Significantly, the plaintiffs omit the rest of the statement: "to wit: for medical devices (i.e. prosthetics, dentures, eyeglasses), higher education/scholarships and a general purpose investment fund." *Id.* In any event, the present dispute is over the taxability of the funds, not the propriety of the purpose and use of them.

[21] Having reached this conclusion, it is unnecessary to address the government's argument that the exemption in the 1983 Plan was "a federal agency exemption ... valid only to the extent of the authority of the Secretary of the Interior." Defendant's response, pp. 5-6.

contrary. Courts have repeatedly held that amounts received by an Indian for services performed as a member of a tribal council are taxable, even if the monies "had their origin in funds which were held in trust by the Government and which were derived for the most part directly from tribal lands held in trust by the Government for the benefit of the respective tribes." *Hoptowit v. Comm'r*, 78 T.C. 137, 146-48 (1982), *affd*, 709 F.2d 564 (9th Cir. 1983); *see Comm'r v. Walker*, 326 F.2d 261 (9th Cir. 1964). *See generally Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156 (1973) ("Absent a 'definitely expressed' exemption, an Indian's royalty income from Indian oil lands is subject to the federal income tax although the source of the income may be exempt from tax."). As the defendant notes, if the plaintiffs are correct, then any employee of the plaintiffs' Tribe or one of the other Potawatomi tribes listed on the 1983 Plan, who provides services benefiting their tribe, could claim their wages to be tax exempt if they were paid from the same source of funds.

In its motion, defendant asserts that plaintiffs rely on a 1959 revenue ruling, Rev.Rul. 59-384,[22]

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[22] The plaintiffs state that they rely on Revenue Ruling 59-354 only for its recognition that income can be tax exempt if an exemption is created by a statute or treaty. The ruling pertains to the Indian tribes' liability for FICA and FUTA taxes. See Rev.Rul. 59-354. It "excludes compensation for the duties performed by elected tribal council members from the definition of 'wages' for the purposes of FICA, FUTA, and income tax withholding," but "does not exempt [Barrett]'s income from tax." *Allen*, 2006 WL 177408, at *3.

Internal Revenue Manual § 4.88.1.6.3.1,[23] and other statutes and treaties to support their position of no tax liability. These authorities, while cited as the bases for the plaintiffs' refund claim (Exhibit 4 to defendant's motion, Attachment to Form 1040X, plaintiffs' Amended Federal Income Tax Return), were not relied on or discussed by the plaintiffs in their summary judgment motion and supporting brief. The plaintiffs did address them, in part, in their response to the defendant's motion, but these authorities do not exempt Barrett's compensation from taxation.

Due to the absence of an exemption "based upon clearly expressed language in a statute or treaty, *Doxtatorv. Comm'r,* 89 TCM (CCH) 1270, 2005 WL 1163978, *4 (2005), the undisputed facts establish that the $48,057.64 Barrett received as compensation from the Tribe was taxable income.

The remaining issue is whether the plaintiffs have set out sufficient evidence to create a material fact question as to the propriety of the accuracy-related penalty under 28 U.S.C. Sec. 6662. A penalty is warranted if a taxpayer's underpayment of tax is attributable to: "[n]egligence or disregard of

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[23] The plaintiffs state that "[t]he Barretts' reference to the Internal Revenue Manual is applicable, but irrelevant." Plaintiffs' response, p. 10.

rules or regulations."[24] 26 U.S.C. § 6662(b). "[N]egligence includes any failure to make a reasonable attempt to comply with the provisions of this title, and the term 'disregard' includes any careless, reckless, or intentional disregard." 26 U.S.C. § 6662(c). A penalty is not imposed under § 6662 "with respect to any portion of an underpayment if it is shown that there was a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion." 26 U.S.C. § 6664(c)(1). The taxpayer must demonstrate both reasonable cause for the underpayment and that he acted in good faith. *Van Scoten v. Comm'r,* 439 F.3d 1243, 1259 (10th Cir. 2006) ("Section 6664(c) of the Tax Code provides an exception to § 6662(a)'s addition to tax for any portion of an underpayment if the taxpayer can show that there was a reasonable cause for, and the taxpayer acted in good faith with respect to, that portion.").

Plaintiffs assert that if they underpaid their taxes for the 2001 tax year, they had reasonable cause for the underpayment and acted at all times in good faith. They claim that it is not just Barrett's position that his income is tax-exempt, but also that of the Tribe. Their actions were not hidden, the plaintiffs assert, as the Business Committee approved the payment from the trust funds and both the auditor of the Tribe's records and the Tribe's accounting department were aware of the Tribe and

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[24] A penalty also can be imposed for "[a]ny substantial understatement of income tax," but the defendant seeks imposition of the penalty based solely on the taxpayers' asserted negligence or disregard

Barrett's position that the compensation was not subject to Federal income tax. The plaintiffs argue that their situation is akin to that of the plaintiffs in *Lazore v. Comm'r*, 11 F.3d 1180 (3d Cir. 1993), where the taxpayers claimed they were exempt from tax based on several treaties and the Constitution.

The defendant argues that not only did the plaintiffs make no effort to determine their proper tax liability, they took affirmative steps to prevent the IRS from determining the tax owed by preventing the Tribe from issuing Forms W-2 or 1099.[25] The defendant contends that *Lazore* is inapposite as here the plaintiffs cite no authority to support their position that Barrett's income was exempt from taxation and no evidence, other than Barrett's affidavit, to demonstrate the Tribe's belief that his compensation was nontaxable. "The determination of whether a taxpayer acted with reasonable cause and in good faith is made on a case-by-case basis, taking into account all pertinent facts and circumstances." Treas. Reg. § 1.6664-4(b)(1). "Reasonable cause and good faith might be indicated by 'an honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge, and education of the taxpayer.'" *Van Scoten*, 439 F.3d at 1259 (quoting Treas. Reg. § 1.6664-4(b)(1). "General-

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[25] The plaintiffs respond that while disclosure may affect the penalty imposed there is no obligation to disclose "the relevant facts affecting the item's tax treatment." 26 U.S.C. § 6662 (d) (2) (B) (ii)(I). As plaintiffs' good faith or its absence is not determinative of the present motion, it is unnecessary to resolve the issue here.

ly, the most important factor is the extent of the taxpayer's effort to assess the taxpayer's proper tax liability." Treas. Reg. § 1.6664-4(b)(1).

If the present motion turned only on the issue of the plaintiffs' subjective good faith, the court would likely conclude that sufficient evidence has been presented to create a fact question as to that issue.[26] However, as noted above, the taxpayer's determination must have been in good faith and with "reasonable cause." The latter standard is an objective one and the question hence becomes whether plaintiffs have presented sufficient evidence, under the standards applicable to summary judgments, to create a material question of fact as to the objective reasonableness of the position they took as to the taxability of the disputed income. The court concludes they have not.

The only authority to which the plaintiffs point in justifying the reasonableness of their filing was their reading of Revenue Ruling 59-384, particularly its reference to income potentially being exempt due to treaties or statutes, and their reading of the various statutes and plans adopted pursuant

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[26] Although plaintiffs' submissions do not reflect the usual actions or circumstances as would evidence good faith, such as upfront disclosure of their position to the IRS, reliance on the advice of an attorney or tax professional, or reliance on some other authority supporting their position, Mr. Barrett's affidavit as to his own subjective understanding of the law would likely have been sufficient to create a fact question as to good faith.

to them.[27] However, the referenced revenue ruling clearly points out the general principles of law applicable in this area: that payments to tribal members are includable in the member's gross income unless an exemption "derive[s] plainly" from a statute or treaty.[28] The relatively convoluted argument upon which the plaintiffs rely to trace their theory of non-taxability cannot be said to be "plain" by any stretch. Not only is it contrary to general principles of taxability of payments to tribal members, but it also substantially misreads the statutes in question, taking provisions of them which are directed to taxation of the Tribe and applying them instead to taxation of the recipients of tribal funds. It applies the various tax exemption provisions in ways and contexts outside their proper scope. In any event, the court concludes that the plaintiffs' position as to the tax treatment of Barrett's salary, though inventive, is outside the bounds of what can be termed objectively reasonable. Under these circumstances, the court concludes that the underpayment was attributable to negligence or disregard and the penalty was therefore properly imposed.

In light of the foregoing, defendant's motion for summary judgment [Doc. #33] is GRANTED and the plaintiff's motion [Doc. #35] is DENIED.

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[27] Stipulation, ¶37.

[28] *See also, Squire v. Capoeman*, 351 U.S. at 6: "We also agree that, to be valid, exemptions to tax laws should be clearly expressed."

IT IS SO ORDERED.

Dated this 5th day of December, 2007.

/s/Joe Heaton
UNITED STATES DISTRICT JUDGE

EXCERPTS FROM THE USE AND DISTRIBUTION PLAN PUBLISHED IN THE FEDERAL REGISTER ON SEPTEMBER 8, 1983 ("THE 1983 AGREEMENT") 48 FR 40567-01

Programming Aspects

Section 5 . . .

(d) Citizen Band Potawatomi Indians of Oklahoma. The funds for the programing aspect (30%) shall be utilized in a Ten-Year Tribal Acquisition, Development, and Maintenance Plan. The 10-year plan shall include the acquisition of additional lands to build upon the tribal land base, the development of the tribe's assets and to provide for the maintenance and care of the tribal property, as set forth in Tribal Business Committee Resolution No. Pott 81-32, adopted June 8, 1981, and confirmed by the June 27, 1981, General Council, and as clarified and defined in Tribal Business Committee Resolution No. Pott 82-6, adopted September 23, 1981. Such funds shall be held and invested by the Secretary pursuant to the provisions of 25 U.S.C. 162a until advanced under procedures set forth in this subsection:

(i) All expenditures of funds, including the initial $500,000 from the interest account to commence the implementation and administration of the ten-year plan, shall be subject to the preparation

by the Tribal Business Committee of an annual tribal budget, with specific line item budgets covering the proposed uses of such funds for the year, which shall be subject to approval by the General Council and the Secretary. Program accountability reports shall be provided to the General Council and the Secretary with the annual tribal budget presented for approval. In preparing tribal budgets, the tribe shall plan the use of the interest and investment earnings on the principal funds first.

(ii) The Tribal Business Committee shall be required to prepare, separate from annual line item tribal budgets, appropriate administrative guidelines and plans of operation covering the 10-year plan, which also shall be subject to approval by the General Council and the Secretary. All tribal actions taken prior to the effective date of this plan, in approving the administrative guidelines, plans of operation, and tribal budgets of the programing aspects of the Citizen Band plan, are subject to such actions being reconfirmed or revised under the provisions of the effective plan, and approved by the General Council and the Secretary.

(iii) At the end of the 10-year program period, the General Council shall evaluate tribal needs as concerns the remaining balances in the program principal and interest accounts, and any changes proposed by the General Council shall be subject to approval by the Secretary.

(iv) In view of the scattered nature of the population, the Tribal Business Committee should

establish a line of communication with the general membership of the tribe for the purpose of keeping them informed on the status and progress of the Ten-Year Acquisition, Development and Maintenance Plan

General Provisions

Section 6. No person shall be entitled to more than one per capita share of the funds in his/her own right. The per capita shares of competent adults shall be paid directly to them. Per capita shares of deceased individual beneficiaries shall be determined and distributed in accordance with 43 CFR Part 4, Subpart D. Per capita shares of legal incompetents and minors shall be handled as provided in the Act of October 19, 1973, 87 Stat. 466, as amended January 12, 1983, by Pub. L. 97-458.

(b) None of the funds distributed per capita or made available under this plan for programing shall be subject to Federal or State income taxes, nor shall such funds nor their availability be considered as income or resources nor otherwise utilized as the basis for denying or reducing the financial assistance or other benefits to which such household or member would otherwise be entitled under the Social Security Act or, except for per capita shares in excess of $2,000, any Federal or federally assisted programs.

(c) To insure the proper performance of the approved plans, the Area Director shall provide an accounting of the expenditure of all programming funds and shall report deficient performance of any

aspect of a plan to the Secretary, together with the corrective measure the Area Director has taken or intends to take, as provided in subpart 87.12, 25 CFR Part 87, of the rules and regulations implementing the Indian Judgment Funds Act of 1973, 25 USC 1401; 87 Stat. 466.

EXCERPTS FROM CITIZEN BAND POTAWATOMI GENERAL COUNCIL RESOLUTION POTT-85-1

Administrative Guidelines – Set Aside Funds

1.4 Use of Funds – The program monies are to be used for the Ten Year Tribal Acquisition, Development and Maintenance Plan. . . . The following definitions shall apply to the Ten Year Tribal Acquisition, Development and Maintenance Plan:

Development – The term "development," as used in context with the Program, shall be those activities and/or actions undertaken by the Tribe to in some way cause growth, building up, expansion, strengthening, increased effectiveness or other evolutionary process toward the progress of the Tribe economically and/or socially, and/or governmentally.

EXCERPTS FROM CONSTITUTION OF THE CITIZEN POTAWATOMI NATION

ARTICLE 5 - CITIZEN POTAWATOMI NATION INDIAN COUNCIL

Section 1. There shall be a Citizen Potawatomi Nation Indian Council. The membership of the Citizen Potawatomi Nation Indian Council shall be all Citizen Potawatomi Nation Indians, 18 years of age or older who have not been adjudged incompetent by a court of competent jurisdiction.

Section 3. There is reserved to the Citizen Potawatomi Nation Indian Council the authority to approve all actions of the Business Committee, or to delegate specific authority to the Business Committee to take particular actions, prior to any such action of the Business Committee becoming effective, which results in:

(a) the appropriation and budgeting of available tribal funds held in trust as the proceeds of any claim against the United States or from or as a result of any treaty obligation received from the United States including interest earned thereon for expenditure for the benefit of the Tribe; . . .

* * *

ARTICLE 6 - EXECUTIVE OFFICERS

Section 1. The Executive Officers of the Tribe shall be the Chairman, Vice-Chairman, and a Secretary/ Treasurer who shall serve for four (4) year terms of office and until their successors shall be qualified and installed in office.

Section 2. It shall be the duty of the Chairman to preside at all meetings of the Council and the Business Committee and perform all duties appertaining to the office, and the Chairman shall see that the laws of the Tribe are faithfully enforced. The Chairman shall have general supervision of the affairs of the Council and of the Business Committee.

* * *

ARTICLE 7 - BUSINESS COMMITTEE

Section 1. There shall be a Business Committee which shall consist of the Executive Officers as provided in Article 6 and two (2) Councilmen who shall serve for four (4) year terms and until their successors shall be qualified and installed in office.

Section 2. Subject to any limitations in this Constitution, and except for those powers expressly reserved to the Citizen Potawatomi Nation Indian Council by this Constitution, or delegated to another tribal entity by this Constitution, the Business Committee is empowered to enact legislation, transact business, and otherwise speak or act on behalf of the Citizen Potawatomi Nation in all

matters of which the Tribe is empowered to act now or in the future, including the authority to hire legal counsel or represent the Tribe, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior so long as such approval is required by Federal law.

25 U.S.C. § 1403(b)(5)

§ 1403. Preparation of plan

(b) Guidelines

In preparing a plan for the use or distribution of the funds of each Indian judgment, the Secretary shall, among other things, be assured that-

(5) a significant portion of such funds shall be set aside and programed to serve common tribal needs, educational requirements, and such other purposes as the circumstances of the affected Indian tribe may justify, except not less than 20 per centum of such funds shall be so set aside and programed unless the Secretary determines that the particular circumstances of the pertinent Indian tribe clearly warrant otherwise: Provided, That in the development of such plan the Secretary shall survey past and present plans of the tribe for economic development, shall consider long range benefits which might accrue to the tribe from such plans, and shall encourage programing of funds for economic development purposes where appropriate;

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(3)

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No. 09-32

In the Supreme Court of the United States

JOHN A. BARRETT, JR. AND SHERYL S. BARRETT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the salary paid to petitioner by the Citizen Potawatomi Tribe was exempt from federal income taxation.

2. Whether petitioner is liable for a penalty for underpaying his federal income taxes without reasonable cause.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 561 F.3d 1140. The opinion of the district court (Pet. App. 22-38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2009. The petition for a writ of certiorari was filed on July 6, 2009 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Citizen Potawatomi Tribe (the Tribe) is a federally recognized tribe of American Indians. Pet. App. 2 n.2. During the 1970s and 1980s, the Tribe was awarded judgments against the United States based on the

taking of its lands without adequate compensation. *Id.* at 3. The judgments were held in trust for the Tribe by the Secretary of the Interior. *Ibid.*

The distribution of the Tribe's judgment awards was governed by the Indian Tribal Judgment Funds Use or Distribution Act (Distribution Act), 25 U.S.C. 1401 *et seq.* As contemplated by the statute, the Tribe and the Secretary of the Interior developed a distribution plan for the judgment funds under which 70% of the funds would be distributed pro rata to the members of the Tribe and 30% would remain in trust. 48 Fed. Reg. 40,567 (1983); Pet. App. 3-4. The plan specified that the 30% of the funds still held in trust would be used for "the acquisition of additional lands to build upon the tribal land base, the development of the tribe's assets and to provide for the maintenance and care of the tribal property." *Id.* at 4. The Distribution Act provides that funds that are "distributed per capita or held in trust pursuant to a plan approved under the provisions of" the statute are not "subject to Federal or State income taxes." 25 U.S.C. 1407.

2. Petitioner John A. Barrett, Jr., is a member of the Tribe and has been involved with its governance since 1971. Pet. App. 2.[1] In 1985, he was elected chairman of the Tribe, and he has been re-elected chairman each year since then. *Ibid.* In 1996, petitioner decided that his salary as chairman could be paid from the earnings accrued on the Tribe's trust fund and that he would not be taxed on that income. *Id.* at 7. He instructed the

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[1] The tax return at issue in this case was filed jointly by Mr. Barrett and his wife, Sheryl S. Barrett. Pet. App. 1 n.1. Mrs. Barrett has joined in the petition for a writ of certiorari, but because her activities are not otherwise relevant to the case, this brief will refer solely to Mr. Barrett as "petitioner."

Tribe's accounting department not to withhold taxes from his compensation and not to issue him a Form W-2. *Ibid.* On their joint federal income tax return for 2001, petitioner and his wife did not report the compensation that he had received from the Tribe. *Ibid.*

Following an audit of the return, the Internal Revenue Service determined that petitioner's compensation was taxable income and that he was liable for an underpayment penalty under 26 U.S.C. 6662. Pet. App. 7. Petitioner paid the additional tax and penalty—which totaled approximately $23,000—and then sued for a refund. *Id.* at 7-8.

3. The district court granted summary judgment in favor of the government. Pet. App. 22-38. The court held that no applicable statute or treaty contained language that clearly exempted petitioner's salary from federal income taxation, and that the salary was therefore taxable. *Id.* at 33. The court also sustained the imposition of the penalty under Section 6662, holding that petitioner lacked "reasonable cause," see 26 U.S.C. 6664(c)(1), to believe that his salary was exempt from tax. Pet. App. 36-37.

4. The court of appeals affirmed. Pet. App. 1-21. Petitioner argued that, because his work as chairman included oversight of the Tribe's operations, the salary he received for that work could be considered part of the development of the Tribe and was therefore payable out of the tax-exempt trust funds. *Id.* at 10-11. The court rejected that contention, concluding that petitioner's "compensation for the oversight of day-to-day operations cannot be considered development under the expressed definition of the term" in the Tribe's plan. *Id.* at 11. The court also held that even if petitioner's salary satisfied the intended-use criteria governing the trust

funds, the tax-exemption provision on which petitioner relied was not sufficiently specific to exempt his income from taxation. *Id.* at 12-13.

The court of appeals also affirmed the underpayment penalty imposed on petitioner pursuant to Section 6662. Pet. App. 13-21. The court concluded that petitioner had not established reasonable cause for the underpayment. *Id.* at 20. The court explained that petitioner had "made no effort to ascertain his tax status beyond his own interpretation of the convoluted, historical legislation, revenue regulations, and tribal treaties," and that his "efforts to assess his proper tax liability for his salary as chairman were incredibly minimal—almost non-existent." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-17) that his salary as chairman of the Tribe was exempt from federal income taxation and that he should not have been subject to a penalty for underpaying his tax. The court of appeals correctly rejected those claims, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Section 1 of the Internal Revenue Code imposes a tax on "taxable income." 26 U.S.C. 1. The computation of taxable income begins with a determination of "[g]ross income," which is defined as "all income from whatever source derived." 26 U.S.C. 61(a). That definition "sweeps broadly" and is "subject only to the exclusions specifically enumerated elsewhere in the Code." *United States* v. *Burke*, 504 U.S. 229, 233 (1992); see *United States* v. *Centennial Sav. Bank FSB*, 499 U.S. 573, 583 (1991) (applying "the rule that tax-exemption and -deferral provisions are to be construed narrowly");

cf. *INDOPCO, Inc.* v. *Commissioner*, 503 U.S. 79, 84 (1992) ("an income tax deduction is a matter of legislative grace and * * * the burden of clearly showing the right to the claimed deduction is on the taxpayer") (citation omitted). Those principles are fully applicable to Native Americans, who except as dictated by "treaties or remedial legislation * * * are subject to the payment of income taxes as are other citizens." *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956); see *Cook* v. *United States*, 86 F.3d 1095, 1097 (Fed. Cir.) ("Absent a definitely expressed exemption, Indians, like all other United States citizens, are subject to federal taxation."), cert. denied, 519 U.S. 932 (1996).

Petitioner contends (Pet. 10-15) that the Distribution Act exempts his tribal salary from federal income taxation, and he suggests (Pet. 2, 10) that a contrary interpretation of the statute would "usurp[] the legislation and electoral processes" of the Tribe "in the budgeting and implementation of the agreement as mandated by Congress." Petitioner is incorrect. The Distribution Act states that none of the funds paid to the Tribe and held in trust under an approved plan are subject to income tax. 25 U.S.C. 1407. The approved plan at issue here provides that the funds are to be used for certain specific purposes, including the acquisition of additional tribal lands, development of the Tribe's assets, and maintenance and care of tribal property. 48 Fed. Reg. at 40,568; see Pet. App. 4.

In petitioner's view (Pet. 13), because his duties as chairman included "day-to-day oversight of the development and execution of the various programs" under the plan, his salary is exempt from tax. That argument is flawed because, as the court of appeals noted, "the oversight of day-to-day operations cannot be considered de-

velopment" within the meaning of the approved plan. Pet. App. 11. More importantly, even if petitioner's duties as chairman could be construed as falling within the intended uses of the trust funds, the language of the statute regarding tax exemption does not explicitly encompass tribal officers' salaries. *Id.* at 12. Accordingly, petitioner's arguments are foreclosed by the principle that tax exemptions, including those for Indians, "are not granted by implication" but must be "definitely expressed" in statutory language. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 156 (1973) (citations omitted).

Petitioner does not contend that the decision below conflicts with any decision of this Court or any other court of appeals. To the contrary, the Tax Court and several courts of appeals have held that money received by Native Americans for serving as tribal council members—including money paid from tribal trust funds—is not exempt from tax. See, *e.g.*, *Allen* v. *Commissioner*, 91 T.C.M. (CCH) 673 (chairman of tribe liable for tax on his salary; fact that tribe is non-taxable entity is irrelevant), aff'd, 204 Fed. Appx. 564 (7th Cir. 2006); *Hoptowit* v. *Commissioner*, 78 T.C. 137, 145-148 (1982), aff'd, 709 F.2d 564 (9th Cir. 1983); *Jourdain* v. *Commissioner*, 71 T.C. 980, 987 (1979), aff'd, 617 F.2d 507 (8th Cir.), cert. denied, 449 U.S. 839 (1980); *Commissioner* v. *Walker*, 326 F.2d 261, 264 (9th Cir. 1964); *Doxtator* v. *Commissioner*, 89 T.C.M. (CCH) 1270, 1274 (2005); *Allen* v. *Commissioner*, 89 T.C.M. (CCH) 1310 (2005). Although the income from certain Indian lands may be tax-exempt, the payment of that income (or interest earned on trust funds derived from tribal lands) to tribal officers as compensation for services rendered is a tax-

able event. See *Hoptowit*, 709 F.2d at 566; *Walker*, 326 F.2d at 264.[2]

2. Petitioner also contends (Pet. 16) that the imposition of an underpayment penalty under 26 U.S.C. 6662 "improperly chills" the Tribe's ability to use "its sovereign power to appropriate income tax exempted funds." The penalty at issue in this case, however, was imposed on petitioner rather than on the Tribe. And, as the court of appeals pointed out, the record shows that petitioner unilaterally decided that his salary could be paid out of tax-exempt funds. Pet. App. 17-20. Petitioner provided no evidence that he sought professional advice, and he ignored the substantial body of case law cited above holding that Indian tribal salaries are not exempt from taxation. For those reasons, both lower courts correctly determined that petitioner had not shown "reasonable cause" for his underpayment so as to make the statutory penalty inapplicable. 26 U.S.C. 6664(d)(1); see Pet. App. 20; *id.* at 33-37. That factbound conclusion does not warrant this Court's review.

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[2] Amicus Citizen Potawatomi Nation suggests (Br. 6) that the decision below conflicts with *Ramsey* v. *United States*, 302 F.3d 1074 (9th Cir. 2002), cert. denied, 540 U.S. 812 (2003). That is incorrect. *Ramsey* did not involve the Distribution Act. Moreover, the court in *Ramsey* held, in accord with the decision below, that a tax exemption for Indians requires "express exemptive language * * * in the text of the statute." *Id.* at 1079.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 09-32

IN THE
Supreme Court of the United States

JOHN A. BARRETT, JR. and
SHERYL S. BARRETT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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REPLY BRIEF OF THE PETITIONERS

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REPLY BRIEF OF PETITIONERS

In its Opposition Brief, the Government takes an oft-used, but rather worn-out, tactic: "let us rewrite the question and thereby avoid the issue." As rewritten by the Government, this case resolves into a simple, individual tax dispute that is lightly and easily dismissed.

Rewriting allows the Government to ignore the significant issues raised concerning the Distribution Act and Congress' power over tribal judgment funds.

If the Government succeeds, then it gains much:

1. it does not have to it explain why the Tenth Circuit can apply the "tax canon" beyond the clear words of a statute that the Tenth Circuit agrees plainly grants an income tax exemption;

2. it is not bothered to reconcile the Tenth Circuit's conflict with the Ninth Circuit's approach to applying the "tax canon" to tribe specific legislation; *Ramsey v. United States,* 302 F. 3d 1074 (9th Cir. 2002) *cert. denied*, 540 U. S. 812, 124 S. Ct. 54, 157 L.Ed.2d 25 (2003);

3. it does not have to justify the Tenth Circuit's decision to override the statutory construction principles that

this Court established in *Delaware Tribal Business Committee v. Weeks*, 430 U. S. 73, 97 S. Ct. 911, 51 L.Ed.2d 173 (1977);

4. it does not have to mention the Tenth Circuit's conclusion that the "tax canon" is a limit on the Constitution's grant of power to Congress over tribal judgment funds; and

5. it does not have to resolve the messy problem created by the Tenth Circuit's infringement on the act of a tribal government – an act required and authorized by Congress and the Secretary of the Interior.

If the Government's re-write of the question is accepted, then all of these troublesome issues disappear.

A re-write of the question is about all that the Government offers in its brief. The Government depends solely on this age-old strategy to whitewash the problems created when the Tenth Circuit's decision is measured against either the Distribution Act, Congress' power over Indian policy and tribal judgment funds, or long-established principles of this Court.

The extent of the Government's reliance on its re-write is shown by the string-cite of authority at pp. 6 – 7. Without exception, the cases cited did not apply the "tax canon" beyond statutory words that

clearly granted a tax exemption. The cited cases did not involve Congress' unique power over tribal judgment funds. They did not limit a Constitutional grant of power to Congress by means of a canon of statutory construction; they did not disregard prior authority such as *Delaware Tribal Business Committee;* and they did not infringe upon an authorized and required tribal government act which appropriated tribal government funds and assigned tribal government duties. Some of the cases do not even involve a statute or treaty. The Government must re-write the question so that it can ignore these issues and make the simple resolution that this case involves "factbound" conclusions which do not warrant review. (Opp. Br. 7)

PETITIONERS' REPLY TO ARGUMENT
(Opposition Brief at pp. 4 - 7)

This case should be reviewed because the Tenth Circuit applied the "tax canon" beyond the statutory words that clearly grant an income tax exemption, and thus created a conflict with the Ninth Circuit's approach of limiting the "tax canon" to the words of the statute itself. If the statutory words show that Congress intended to grant a tax exemption, then the Ninth Circuit preserves Congress' intent, even if that requires applying less stringent principles of interprettation to non-statutory material. *Ramsey v. US*, 302 F.3d 1074 (9th Cir. 2002), *cert. denied*, 540 U.S. 812, 124 S. Ct. 54, 157 L. Ed. 2d 25 (2003).

The Opposition Brief acknowledges that 25 U.S.C. § 1407 provides an express income tax

exemption for funds used under a plan approved under the Distribution Act. (Opp. Br. p. 5) But, the Opposition Brief, like the Tenth Circuit, has to dig deep into the depths of the plan itself (the 1983 Agreement) and apply the "tax canon" to deny the income tax exemption in this case.

The Opposition Brief correctly points out, in a footnote, that *Ramsey* did not involve the Distribution Act. (Opp. Br. p. 7 at fn. 2.) The Government ignored the fact that both *Ramsey* and this case involve determination of a federally granted tax exemption. In *Ramsey,* the Ninth Circuit limited the "tax canon" requirement of "express exemptive language" to the text of the treaty at issue; it pointed out that if the required exemptive language were present, other ambiguities should be construed favorably to Indian tribes. *Ramsey,* 302 F 3d at 1079. In contrast, the Tenth Circuit applied the "tax canon" clarity standard far beyond the statute's clear grant of a tax exemption. The Tenth Circuit found a lack of express exemptive language in the details of the 1983 Agreement — a document Congress used to provide flexibility for future tribal government action.

A conflict in principle, or a conflict in approach, is a recognized basis for granting review. *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe,* 473 U. S. 753, 764, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985); *Saxbe v Washington Post Co.,* 417 U. S. 843, 846, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974).

The *Ramsey* opinion noted this Court's inconclusive discussion in applying the "tax canon"

and the "Indian canon" to statutory language in *Chickasaw Nation v U. S.*, 534 U. S. 84, 122 S.Ct. 528, 151 L. Ed. 2d 474 (2001), but determined that the discussion did not persuade it to change the long-standing approach used to decide *Ramsey*. A court of appeals decision on a point reserved or left undecided in one of this Court's earlier opinions is also a recognized basis for granting review. *Brown v. Legal Foundation of Wash.*, 538 U. S. 216, 220, 123 S. Ct. 1406, 155 L.Ed.2d 376 (2003).

In addition, review is warranted because the Tenth Circuit opinion shows that Congress cannot protect the Distribution Act from an overly broad judicial application of the "tax canon." Congress clearly chose to put a tax exemption in the Distribution Act. Congress then specifically said that the Distribution Act was to apply "[n]otwithstanding any other law..." 25 U. S. C. § 1401(a). Thus, application of the "tax canon" beyond the statutory words, or perhaps even at all, is contrary to holdings of this Court. *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993) ("notwithstanding" clause clearly signals intent "to supersede all other laws," and a "clearer statement is difficult to imagine"); *Long Island Railroad Co. v. Aberdeen & Rockfish Rail Road Co.*, 439 U.S. 1, 5 99 S.Ct. 46, 58 L.Ed.2d 1 (1978) (per curiam) ("notwithstanding any other provision of law" includes federal law).

Congress can do no more. Its ability to exercise its Constitutional power to determine and implement policy as to Indian affairs should not be

subject to being changed by a court's broad brush application of canons of statutory construction.

The importance of assuring a proper application of the "tax canon" to tribe specific, remedial legislation is shown by the fact that the Tenth Circuit was able to defeat Congress' clear statutory grant of a tax exemption. It is underscored by the Tenth Circuit's stated reasoning that Congress' Constitutional power to set and implement policy as to Indian affairs "...does not trump..." a court's application of a canon of statutory construction.

This is not an individual tax case. Even the Opposition Brief recognizes the applicability of the Distribution Act. But, based on the Opposition Brief, one wonders whether any individual would qualify for the express income tax exemption set forth in 26 U.S.C. § 1407. The exemption can not be directed at the Tribe because the Tribe is not subject to income tax. The only rational basis for the argument of the Opposition Brief is the avoidance of the significant Constitutional, Congressional powers over Indian affairs, and conflicting statutory interpretation issues raised by Petitioners.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

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IN THE
SUPREME COURT OF THE UNITED STATES

JOHN A. BARRETT, JR. and
SHERYL S. BARRETT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF OF CITIZEN POTAWATOMI NATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Citizen Potawatomi Nation ("Citizen Potawatomi") is a federally recognized Indian tribe, with tribal headquarters in Potawatomi County, Oklahoma. 73 Fed. Reg. 18553 (April 4, 2008). Pursuant to policies established and promoted by Congress, Citizen Potawatomi has developed a stable and effective tribal government for approximately 27,000 tribal members.

The Tenth Circuit opinion in this case created a tribal governmental interest in what would otherwise be an individual tax case. Citizen Potawatomi submits this *amicus curiae* brief to set out its tribal governmental interest and support the Petition for Certiorari.

The Tenth Circuit nullified tribal legislative and executive action that Congress had authorized

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[1] No counsel for a party authored this brief, in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The parties have consented to the filing of this brief.

Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief.

and required pursuant to the Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. §1401 *et seq.,* (the "Distribution Act"). The voided tribal governmental actions applied the tribe's income tax exempt tribal judgment funds to paying a salary to the tribe's chairman, (Petitioner in this case).

This nullification arose when the Tenth Circuit applied the tax canon—a canon of construction which requires that tax statutes state exemptions clearly. The Tenth Circuit used this tax canon despite Congress' express instructions that the Distribution Act was to apply "[n]otwithstanding any other law..." 25 U.S.C. §1401(a). Further, the Tenth Circuit extended this clarity requirement beyond the words of the statute; it applied this clarity standard to the terms of a tribal spending plan which the Distribution Act required in order for Citizen Potawatomi to use its judgment funds for common tribal needs.

As part of the remedial measures in the Distribution Act, Congress clearly exempted from income tax all tribal judgment funds distributed or held pursuant to the terms of an approved plan. 25 U.S.C. §1407. It also authorized and required tribal governmental action to identify the specific uses for those funds pursuant to the approved plan. 25 U.S.C. §§1402, 1403.

The Distribution Act implemented tribal government authority by requiring Citizen Potawatomi and the Secretary of the Interior to submit, for Congress' approval, an agreed plan which

outlined the use of the tribe's judgment funds, (the "1983 Agreement"). (*See* Pet. for Cert., Appendix, at pp. 39-42; 48 Fed. Reg. 40567-01 (Sept. 8, 1983). As Congress had required, this outlined plan limited a per-capita distribution to only part of the judgment funds to tribal members; it planned to set-aside and hold a part of the judgment funds for tribal governmental spending on common tribal needs. 25 U.S.C. §1403. The 1983 Agreement left the identification of specific uses to the annual tribal governmental process in which the business committee proposed line-item budgets, which had to be approved by general vote of the tribe and by the Secretary.

Citizen Potawatomi took the required tribal government action to apply seventy percent (70%) of its judgment funds to per-capita distributions of cash to its tribal members. (*See* Pet. for Cert., Appendix, at pp. 3-4.) There was no issue about the income tax exempt nature of those funds; tribal members receiving those funds paid no income tax on them.

Citizen Potawatomi also took tribal government action to set-aside thirty percent (30%) of its judgment funds to be held pursuant to the 1983 Agreement's plan for tribal spending. Every year since 1983[2] Citizen Potawatomi has taken the required tribal governmental action to identify specific applications of the set-aside thirty percent (30%) of its judgment funds.

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[2] Citizen Potawatomi has also taken tribal governmental action to extend application of the principles of the 1983 Agreement to current. (*See* Pet. for Cert., Appendix, at pp. 5-6.)

In 2001, the tribal governmental action applied part of the tribe's set-aside judgment funds to Petitioner's tribal chairman's salary. (See Pet. for Cert., Appendix, at pp. 7-8.) Petitioner did not include these income tax exempted judgment funds in his gross income. Petitioner is subject to income tax statutes of general application. Income tax statutes of general application are construed with the tax canon – a canon that requires exemptions to be stated clearly.

Even though the Distribution Act is Indian specific, remedial legislation, the Tenth Circuit applied the tax canon. More significantly, it stepped beyond applying the tax canon's clarity standard to the statutory wording of the Distribution Act, itself; it expanded application of this clarity standard to the plan that was outlined in the 1983 Agreement.

By applying the tax canon to the 1983 Agreement, the Tenth Circuit concluded that the plan it outlined did not encompass paying the tribal chairman; but if the outlined plan might be understood to encompass paying the tribal chairman, then it lacked the specificity required for Petitioner to claim a tax exemption. The opinion concluded that Congress' power to set and implement Indian policy "...does not trump the long-standing requirement that an exemption from payment of taxes must be explicitly stated." (*See* Pet. for Cert., Appendix, at pp. 11-13.) Citizen Potawatomi has no financial responsibility for Petitioner's resulting tax and penalty. Petitioner is responsible for paying both.

This extended application of the tax canon voided congressionally authorized and required tribal governmental action which identified the use of its judgment funds under the 1983 Agreement. This nullification disregarded Congress' specific authorization and requirement that tribes take governmental action to identify the specifics of applying their judgment funds under an approved plan; it disregarded Congress' clear provision of a tax exemption for tribal judgment funds used pursuant to an approved plan; and, by imposing tax, it eroded the tribe's opportunity to benefit from the complete use of all the money it was awarded to remediate the government's violations against the tribe.

Citizen Potawatomi is not subject to income tax. It can make no direct use of an income tax exemption. Citizen Potawatomi's interest is protecting the full value of its judgment funds against the reduction in value that results from taxation—a protection provided by the plain terms of the Distribution Act. Further, Citizen Potawatomi's interest is protecting authorized and required tribal governmental action from infringement.

SUMMARY OF ARGUMENT

Certiorari should be granted to review the Tenth Circuit's broad application of the tax canon to a tax exemption that Congress provided in Indian specific, remedial legislation; and to review the Tenth Circuit's application of that canon after Congress specifically instructed that the

Distribution Act was to apply, notwithstanding any other law.

As to applying the tax canon's clarity requirement to such exemptions, the Ninth Circuit approach differs from the approach the Tenth Circuit used in this decision. *Ramsey v. United States*, 302 F. 3d 1074 (9th Cir. 2002), *cert. denied*, 540 U.S. 812, 124 S. Ct. 54, 157 L. Ed. 2d 25 (2003). Further, this Court recognized earlier, but left unresolved, questions as to the application of the tax canon to Indian tribe related tax exemptions. *See Chickasaw Nation v. United States*, 534 U.S. 84, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001).

The Tenth Circuit opinion demonstrates that Congress' own effort to protect the Distribution Act from any other law failed to prevent a court from choosing to apply a canon of statutory construction that is unique to tax statutes of general application. Congress specifically provided the Distribution Act was to apply: "[n]otwithstanding any other law..." 25 U.S.C. §1401(a). Despite this protection, the Tenth Circuit applied a canon associated with tax statutes of general application. Congress cannot provide the protection that would result from review by this Court.

The Tenth Circuit decision demonstrates how an overly broad application of the tax canon can impair Congress' exercise of its broad power to set and implement Indian policy, up to the point of frustrating the clear intent stated by Congress in a remedial act, specific to Indian tribes. As a result of

its extended application of the tax canon, the Tenth Circuit's opinion:

1. Narrowed or frustrated intent as set forth by provisions Congress included in the Distribution Act, based solely on a judicial canon of statutory interpretation. The court applied this canon despite Congress' specific instruction that the Distribution Act was to control "[n]otwithstanding any other law..." 25 U.S.C. §1401(a). Canons of construction should not be used to disregard clear expressions of congressional intent. *DeCoteau v. District County Court*, 420 U.S. 455, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975).

2. Nullified tribal governmental legislative and executive action which Congress had both authorized and required under the Distribution Act. It nullified tribal governmental action despite the established principle that courts defer to any special treatment that Congress applies to judgment funds so long as it is rationally tied to meeting Congress' unique obligation to Indians. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 (1977).

3. Supported the results of this broad application of the tax canon by concluding that Congress' power to set and implement policy as to Indian affairs "...does not trump the long-standing requirement that an exemption from payment of taxes must be explicitly stated."

> The Tenth Circuit reached that conclusion despite the established principle that Congress has the power to enact Indian specific, remedial legislation that is not subject to nullification or control by laws of general application. *Morton v. Mancari,* 417 U. S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).

The Tenth Circuit's extension of the clarity requirement beyond Congress' statutory words differs from the Ninth Circuit's approach. The Ninth Circuit applies a clarity requirement to determine whether Congress provided an express tax exemption in the statute. If the statutory words show Congress intended to provide a tax exemption, then any actual application of that exemption is construed favorably to tribes. *Ramsey v. United States*, 302 F. 3d 1074 (9th Cir. 2002) *cert. denied*, 540 U.S. 812, 124 S. Ct. 54, 157 L. Ed. 2d 25 (2003).

ARGUMENT

Canons of construction are judicial guides for determining Congress' intent; they are not conclusive. Evidence of intent embodied in the statute that Congress wrote can overcome conclusions that might be indicated by the use of a canon of construction. *Chickasaw,* 534 U. S. at 94. If Congress has expressed its intent clearly, then a canon of construction should not be used to disregard that intent. *DeCoteau v. District County Court*, 420 U.S. 455, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975).

Citizen Potawatomi recovered tribal judgment funds under the remedial provisions of the Indian Claims Commission Act, 60 Stat. 1069, 25 U.S.C. §70-70v-3 (1946) (repealed). Even though judgment funds were awarded to tribes, Congress retained exclusive, virtually unlimited control of those funds.

Congress has exclusive power to control the use and distribution of tribal judgment funds. Courts preserve this Constitutional grant of power to Congress by deferring to any special treatment that Congress applies to judgment funds, if that treatment is rationally tied to Congress meeting its unique obligation to Indians. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 (1977).

In 1973, Congress directed that all use or distribution of tribal judgment funds would be controlled pursuant to the Distribution Act. 25 U.S.C. §1401. Congress passed the Distribution Act to fund and implement its policy to promote strong tribal governments and Indian self-governance. To provide funding, Congress limited the distribution of judgment funds to individual tribal members. Each tribe had to set aside at least twenty percent (20%) of its judgment funds for tribal government spending on common tribal needs. 25 U.S.C. §1403(b)(5). To promote tribal self-governance, Congress authorized and required tribal governmental action in determining the use or distribution of a tribe's judgment funds.

Congress plainly stated its intent to exempt all tribal judgment funds from income tax. 25 U.S.C.

§1407. Congress also plainly stated its intent that a tribe take governmental action to identify specifics for both: (1) the distribution of the exempt funds to individual members, and, (2) the distribution of exempt funds to meet common tribal needs. 25 U.S.C. §§1402, 1403.

Congress specifically and plainly stated that all use or distribution of these funds was to be made and controlled pursuant to the Distribution Act, and it was to control "[n]otwithstanding any other law..." 25 U.S.C. §1401(a).

The Distribution Act, taken as a whole, evidences the intent of Congress as to judgment funds, as to tribal governmental action necessary to specify their use, and as to the income tax exempt character of judgment funds. The act establishes that Congress intended for tribal governmental action to identify specifics for the use of the tribe's tax exempted judgment funds for common tribal needs.

To implement the Distribution Act, the Secretary of Interior and Citizen Potawatomi agreed to a general plan for tribal use of its judgment funds. The agreement was submitted to Congress for its review and approval. Congress did not object and thus the agreed plan was deemed approved, (the 1983 Agreement).

The Distribution Act's income tax exemption of the judgment funds was reflected in the terms of the 1983 Agreement. The Distribution Act exempted judgment funds which were "...distributed per

capita or held in trust pursuant to a plan approved under the provisions of this chapter..." 25 U.S.C. §1407. The 1983 Agreement exempted judgment funds which were "...distributed per capita or made available under this plan for programing ..." (See Pet. for Cert., Appendix, at p. 41.)

The 1983 Agreement both contemplated and provided the mechanism for annual tribal governmental action to identify specific applications for the tribe's judgment funds.

Because Petitioner is subject to tax statutes of general application, and because courts construe those with the tax canon, the Tenth Circuit applied the tax canon to the exemption he claimed. Applying the tax canon, itself, implicates issues this Court discussed in *Chickasaw*. But, the Tenth Circuit took the step of extending application of the tax canon beyond the statutory words of the Distribution Act. It applied the tax canon's clarity standards to the general plan outlined in the 1983 Agreement.

The Tenth Circuit concluded the general plan did not encompass paying the tribe's chairman; but if the broadly worded 1983 Agreement might be understood to encompass paying the tribe's chairman, then it lacked the specificity the tax canon required to create a tax exemption.

The Tenth Circuit, in effect, concluded that the tax exemption was not available because the general plan in the 1983 Agreement did not specifically authorize the application of judgment funds to Petitioner's salary expense. Under the

Tenth Circuit's reasoning, the 1983 Agreement could not satisfy the clarity standard by relying on clarification by subsequent tribal governmental action and the tribe's annual budgeting process.

Determining the intent of the Distribution Act by examining the clarity of the 1983 Agreement is inconsistent with the concept Congress was pursuing. The Distribution Act intended for plans such as the 1983 Agreement to generally identify the common tribal needs to meet by applying the judgment funds. The 1983 Agreement is intentionally general because it has to allow the flexibility necessary to make annual budgets that meet the needs of the tribe. Both Congress and the 1983 Agreement contemplated that this intentionally created generality would be clarified through annual tribal governmental action that identified the specific uses for the tribe's judgment funds.

The Tenth Circuit's broad application of the tax canon clarity standard poses a dilemma as to how Congress can implement policy as to Indian affairs if a tax exemption is involved. The Tenth Circuit's decision has established that Congress cannot protect enactments from application of the tax canon. Specifically providing that its legislation will control "[n]otwithstanding any other law..." is not enough. So, to assure realization of the benefits of a tax exemption, Congress would be forced to legislate in detailed specificity as to the exact tax exempt applications, tribe by tribe, year by year. Such legislation would undercut Congress' stated policy to promote tribal self-governance; self-

governance would be replaced with constant, detailed, tribal specific enactments that itemize each expenditure of tribal judgment funds.

The Ninth Circuit approach to tribe specific tax exemptions demonstrates how to apply fundamental principles requiring clarity in stating exemptions, and not inferring exemptions, while still preserving Congress' ability to exercise its power to set and implement Indian policy. In *Ramsey v. United States*, 302 F. 3d 1074 (9th Cir. 2002), *cert. denied*, 540 U.S. 812, 124 S. Ct. 54, 157 L. Ed. 2d 25 (2003), the Ninth Circuit applied a clarity requirement to determine whether Congress provided an express tax exemption. If the statutory words show that Congress intended to provide a tax exemption, then issues as to the actual application of that exemption are addressed to assure Congress' intent to act favorably toward tribes.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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